

## DEPARTMENT OF EDUCATION

## 34 CFR Part 200

RIN 1810-AA99

[Docket Id 2007-ED-OESE-130]

**Improving the Academic Achievement of the Disadvantaged; Migrant Education Program**

**AGENCY:** Office of Elementary and Secondary Education, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the regulations governing the Migrant Education Program (MEP) administered under Part C of Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA). These final regulations adjust the base amounts of the MEP Basic State Formula grant allocations for fiscal year (FY) 2006 and subsequent years (as well as for supplemental MEP allocations made for FY 2005); establish requirements to strengthen the processes used by State educational agencies (SEAs) to determine and document the eligibility of migratory children under the MEP; and clarify procedures SEAs use to develop a comprehensive statewide needs assessment and service delivery plan.

**DATES:** These regulations are effective August 28, 2008. However, affected parties do not have to comply with the new information collection requirements in §§ 200.83 and 200.89 until the Department of Education publishes in the **Federal Register** the control number assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control number notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:**

James J. English, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E315, 20202-6135. Telephone: (202) 260-1394 or via Internet: [james.english@ed.gov](mailto:james.english@ed.gov).

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

**SUPPLEMENTARY INFORMATION:** These regulations implement requirements of

the Migrant Education Program (MEP) as authorized under Part C of Title I of the ESEA, as amended. On May 4, 2007, the Secretary published a notice of proposed rulemaking (NPRM) for the MEP in the **Federal Register** (72 FR 25228). In the preamble to the NPRM, the Secretary discussed on pages 25230 through 25236 the major regulatory changes proposed in that document. These proposed changes consisted of the following:

- Amending § 200.81 to add to and improve program definitions governing who is considered an eligible migratory child.

- Amending § 200.83 to clarify that a State's comprehensive needs assessment and plan for service delivery must, as required by the ESEA, include measurable program outcomes for the MEP that relate to the performance targets the State has established for all children.

- Adding a new § 200.89(a) to establish a procedure for the Secretary to use State defect rates that the Secretary accepts as the basis for adjusting the 2000-2001 counts of eligible migrant children, and, thereby determine the base amount of a State's MEP award for FY 2006 and subsequent years. This proposed regulation also required, as a condition to an SEA's receipt of its final FY 2006 and subsequent-year MEP awards, that an SEA conduct a thorough re-documentation of the eligibility of all children (and the removal of all ineligible children) included in the SEA's 2006-2007 MEP child counts).

- Adding a new § 200.89(b) to establish the minimum requirements an SEA must meet in conducting—(a) retrospective re-interviewing, where needed, to examine and validate the accuracy of its statewide eligibility determinations under the MEP, and (b) annual prospective re-interviewing in order to ensure ongoing quality control in all future eligibility determinations.

- Adding a new § 200.89(c) to—(1) establish the minimum requirements an SEA must meet in documenting its eligibility determinations under the MEP (including the use of a standard Certificate of Eligibility (COE) form), and (2) clarify that the SEA is responsible for accurate determinations of program eligibility.

- Adding a new § 200.89(d) to establish minimum requirements for a system of quality controls that an SEA must implement in order to promote accurate migrant child eligibility determinations.

These final regulations contain the following changes from the NPRM:

- The definitions of *agricultural work* and *fishing work* in § 200.81(a) and (b), respectively, have been modified to remove the terms “generally” and “in rare cases” when referring to work done for wages or personal subsistence.

- The definitions of *in order to obtain* and *move or moved* in § 200.81(c) and (g), respectively, have been revised to—(1) remove contradictory language and clarify that a move, for purposes of determining MEP eligibility, must occur due to economic necessity, (2) clarify that individuals who state that a purpose of their move was to seek any type of employment, i.e., workers who moved with no specific intent to find employment in a particular job, are deemed to have moved with a purpose of obtaining qualifying work if the worker obtains such work soon after the move, and (3) clarify the information that an SEA must have to determine that a worker who did not obtain qualifying work soon after a move did move in order to obtain qualifying work.

- The definition of *migratory agricultural worker* in § 200.81(d) has been revised to clarify that agricultural work includes dairy work.

- The definition of principal means of livelihood in proposed § 200.81(i) has been removed.

- The definitions of *migratory agricultural worker* and *migratory fisher* in §§ 200.81(d) and (f), respectively, have been revised to remove the reference to “principal means of livelihood” and clarify that, in order to establish MEP eligibility, a move as defined in § 200.81(g) made by a migratory agricultural worker or migratory fisher must occur due “to economic necessity.”

- Section 200.81(h) has been revised to clarify that the term *personal subsistence* means that the worker and his or her family, as a matter of the family's economic necessity, consume, as a substantial portion of their food intake, the crops, dairy products, and livestock they produce or the fish that they catch.

- To simplify the definition of *in order to obtain*, we have added a new definition of *qualifying work* in § 200.89(i) to mean temporary employment or seasonal employment in agricultural work or fishing work.

- The definition of *seasonal employment* in § 200.81(j) has been revised to clarify that seasonal employment is employment that occurs only during a certain period of the year due to the cycles of nature and that, by its nature, may not be continuous or carried on throughout the year.

- The definition of *temporary employment* in § 200.81(k) has been

revised to simplify how temporary employment is determined and to provide greater clarity and flexibility as to how (when and how often) an SEA must validate that employment that appears to be constant and year-round can reasonably be considered temporary employment.

- Section 200.89(a)(2) has been revised to clarify that the “thorough re-documentation” referred to in this paragraph means that an SEA must examine its rolls of all currently identified migratory children and remove from the rolls all children it judges to be ineligible based on the types of problems identified in its statewide retrospective re-interviewing as causing defective eligibility determinations.

- Section 200.89(b)(1)(i) has been revised to clarify that, in addition to those States that have not yet conducted retroactive re-interviewing, any SEA that submitted a State defect rate that is not accepted by the Secretary, or that has a problem in identification and recruitment that is subject to corrective action, will also need to conduct retrospective re-interviewing.

- Section 200.89(b)(2)(iii) has been revised to permit, in prospective re-interviewing, use of alternative interviewing methods including telephone re-interviews if face-to-face re-interviewing is found to be impractical without regard to whether, as the NPRM would have required, the circumstances making face-to-face re-interviewing impractical would be considered “extraordinary.”

- Section 200.89(d)(3) has been revised to permit more flexibility in how an SEA transmits its responses to eligibility policy questions to all its local operating agencies (LOAs).

- Section 200.89(d)(7) has been revised to clarify that an SEA’s policy for implementing corrective actions includes addressing monitoring or audit findings of the Secretary, as well as those of the State.

These changes are explained more fully in the *Analysis of Comments and Changes* section that follows.

### Analysis of Comments and Changes

In response to the Secretary’s invitation in the NPRM, 26 parties submitted over 125 comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows. We discuss substantive issues primarily under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes—and

suggested changes the law does not authorize the Secretary to make.

### General

*Comments:* Several commenters noted generally that the proposed regulations clarified and more fully explained some confusing elements of the current regulations and non-regulatory guidance. One commenter, however, suggested that in light of Congress’ plans to reauthorize the ESEA, the Department should wait to issue any of the new regulations and, instead, revise the Department’s non-regulatory guidance on the MEP. Three other commenters suggested that we not change the program definitions prior to reauthorization of the ESEA.

*Discussion:* The Secretary appreciates the commenters’ recognition that the proposed regulations represent an attempt to clarify confusing issues in the current regulations and non-regulatory guidance.

The Secretary does not agree that issuance of final regulations should await the next ESEA reauthorization. We do not know when Congress will reauthorize the ESEA and the MEP, and the issues addressed in these regulations—improved definitions, an updated allocations process, and defined quality control procedures—are needed now in order to resolve serious problems and implement essential improvements in program operations. Moreover, the Secretary believes that the definitions established in these final regulations will continue to be useful, even after reauthorization, in helping to standardize and otherwise improve the clarity and accuracy of State eligibility determinations. These definitions will help to ensure the basic integrity of the MEP and that the MEP benefits those children it is designed to serve.

*Changes:* None.

### Paperwork Burden and Potential Costs and Benefits

*Comments:* Five commenters expressed concerns about the potential costs and burden associated with several sections of the proposed regulations. Three commenters expressed concern about the estimated \$4.5 million of annual additional costs of collecting information needed to implement the proposed regulations [72 FR 25236]. While acknowledging that States already conduct some of these activities in order to implement their statutory responsibilities, these commenters stated that much of these additional costs would be attributable to unnecessary activities that the regulation would require. Another commenter questioned the accuracy of

our statement in the NPRM [72 FR 25236] that the proposed regulations would not add significantly to the costs of implementing the MEP. Still another commenter noted that the estimates of time and funds in the associated OMB information collection package 1810–0662 did not differentiate between States that receive large and small MEP allocations, and that requiring each State to spend a total of 20,691 hours to comply with the regulations would overwhelm States with small MEP allocations and negatively affect their ability to provide direct services to migratory children. The commenter also questioned the accuracy of the Department’s assertion in the preamble to the NPRM [72 FR 25232] that much of the annual survey in proposed § 200.81(k), regarding the definition of *temporary employment*, reflects work States already do to update information on eligibility and continued residency of previously identified migratory children. Three commenters also expressed concern about the ability of States with small MEP allocations to fulfill their responsibilities under § 200.89(c) to document child eligibility, and stated that the paperwork burden associated with meeting these requirements might compel these States to end their participation in the MEP.

Another commenter stated that we had, in our OMB information collection package (1810–0662), greatly underestimated the average time needed to complete re-interviews, determine eligibility, complete and update COEs, and implement the other quality control procedures identified in the proposed regulations. The commenter suggested that States would need four hours rather than two hours to conduct each re-interview, four hours rather than one and one-half hours to make an eligibility determination, and two hours rather than one-third hour to complete a COE.

*Discussion:* The Secretary appreciates the commenters’ concerns. However, for the most part, the estimated \$4.5 million of “additional” costs of information collection under this regulation are not new. Rather, these costs and associated information burden are “additional” only in that they would now be attributable to these specific MEP regulations instead of the requirements of the statute and applicable sections of EDGAR.

We estimate that SEAs and their local operating agencies (LOAs) [see definition in section 1309(1) of ESEA] have historically expended approximately these amounts implementing various eligibility determination activities under the general authority of the statute and the

general requirements for documentation and program monitoring that are in 34 CFR 76.731 (section 76.31 of the Education Department General Administrative Regulations (EDGAR)). For example, those provisions have always required SEAs and their LOAs to document the basis for determining that a child meets the MEP eligibility requirements, whether on a COE or in another written record. They also have required SEAs to review COEs in terms of content and completeness, and ensure training and oversight of staff conducting identification and recruitment. As we explained in the information collection package associated with these final regulations that the Department submitted to OMB [1810-0662], the annual total cost to collect, review and update COEs—now to be required by § 200.89(c), but responsibilities that SEAs and their LOAs already have—accounts for over 60 percent of the estimated “additional” \$4.5 million annual cost.

In addition, the cost and burden-hour estimates identified in the preamble to the NPRM and the associated information collection package represent an average across all States. The Secretary expects that States with smaller MEP allocations will expend considerably fewer hours and considerably less program funds in implementing these regulations than the averages referred to in the preamble to the NPRM in and the information collection package. Of course, conversely, States with large MEP allocations will likely expend somewhat greater amounts of effort and program funds than the averages, but they also receive proportionally more annual MEP funding.

Finally, with regard to the cost of validating the temporary nature of work that otherwise appears to be constant and year-round, the Secretary continues to believe that such validation can be accomplished at little or no additional expense or burden as part of the process that SEAs now conduct to annually update prior eligibility and continued residency of migrant children. However, as discussed elsewhere in these final regulations, the Secretary is simplifying this requirement.

The Secretary continues to believe, based on both the expertise of Departmental staff with prior State-level experience and discussions with State MEP staff, that the Department’s cost estimates for re-interviews, determining eligibility, and updating COEs represent a reasonable estimate of the average time needed to carry out these activities. However, we note that the public will have another opportunity to comment

on the burden as estimated in the OMB information package [1810-0662] before the information requirements of the final regulation become effective. The Secretary will take into consideration any other comments received from the public on these issues.

*Changes:* None.

*Section 200.81 Program definitions.*

*Section 200.81(a) and (b)—*

*Agricultural work and Fishing work.*

*Comments:* Two commenters indicated that they had no substantive concerns with the proposed changes to these definitions. However, other commenters expressed concern that the proposed changes would unnecessarily restrict MEP eligibility or create problems in identifying exactly which workers perform temporary or seasonal agricultural or fishing work.

As a point of reference, current regulations (34 CFR 200.81(a)(1)) define an *agricultural activity* to include “[a]ny activity directly related to the \* \* \* processing of crops, dairy products, poultry or livestock for initial commercial sale or personal subsistence.” The current definition of a *fishing activity* in 34 CFR 200.81(b) contains a similar phrase. Aside from proposing to change the term “activity” to “work” in each definition so as to conform to the terms used in the statutory definition of *migratory child*, we proposed to revise the phrase “processing \* \* \* for initial commercial sale” in both definitions to state simply “for initial processing.” We also proposed to eliminate the phrase “directly related to” in both definitions.

With respect to these proposed changes, several commenters stated that it would be difficult to determine when “initial processing” ends, i.e., what particular phases or types of agricultural or fish processing work would be considered “initial processing.” One commenter asked whether planting or clearing a farm field might be considered “initial processing.” Some commenters suggested that the final regulations define the term “initial processing;” one of these commenters suggested that the term cover multiple stages of activity, perhaps up through the point of initial commercial sale either because it will be difficult to decide when “initial processing” ends, or because there may be processes constituting refinement of the raw product that occur after “initial processing” that should still reasonably be considered a qualifying activity. Other commenters recommended that before adopting final regulations, the Secretary further study the various processing industries to identify which

activities can reasonably be considered “initial processing.”

Another commenter asked that we retain the language, “any activity directly related to,” that is in the current definitions because it helps a State distinguish between workers who are handling the crops and, therefore, would be eligible for the MEP, and the crew chiefs, mechanics, and other workers (e.g., inventory clerks) who might be employed on a farm but would not be eligible. Another commenter stated that we should retain the language “initial commercial sale” because it establishes a point after which work is no longer qualifying for purposes of the MEP.

With regard to our proposal to include in the definition of *fishing work* a statement that this work “consists of work generally performed for wages or in rare cases personal subsistence,” two commenters recommended that we remove the phrase “in rare cases” because some States have substantial populations that fish for subsistence purposes rather than fish for wages.

Finally, another commenter recommended including the hunting or harvesting of whales, walrus, and seals in the definition of *fishing work* because these activities are conducted for personal subsistence.

*Discussion:* We proposed to remove the phrases “an activity directly related to” and “initial commercial sale” that are in the current definitions because we found that these phrases were vague, difficult to apply, and applied differently in different States. We believe that referring to “initial processing,” which as stated in the NPRM [72 FR 25230] involves working with “raw products,” will enable State and local MEP personnel to identify more precisely the particular (and more limited) types of work, especially processing work, that can reasonably be considered agricultural or fishing work for purposes of establishing eligibility under the MEP.

We do not agree that the regulations should define the term “initial processing” more specifically. We think that States may find it more helpful for the Department to address in non-regulatory guidance how this term applies in specific circumstances. This approach will provide SEAs with greater flexibility to consider particular situations in different processing industries—each of which has different sets of jobs that can reasonably be considered “initial processing” and different points in the processing cycle where “initial processing” (i.e., of a raw product into a more refined product) might reasonably be determined to end.

With respect to the last sentence of the definitions of both *agricultural work* and *fishing work* that, as proposed, provided that the work would be performed “generally for wages” or “in rare cases personal subsistence,” the Secretary believes that migratory work for purposes of personal subsistence is, in general, a rare occurrence nationally and that most of the work is performed for wages. However, the Secretary agrees to remove the phrases “generally” and “in rare cases” to avoid any further confusion.

Finally, the Secretary does not agree that the hunting or harvesting of whales, walrus, or seals should be included in the definition of *fishing work* as the commenter suggested. The ESEA provides that eligibility under the MEP depends on work in agriculture or fishing. While the Secretary recognizes that whales, walrus, or seals are harvested for personal subsistence, these animals are not fish, and catching or processing them cannot be considered to be fishing work. Moreover, excluding the catching or processing of these animals from eligible agricultural or fishing work is consistent with the Department’s longstanding policy that hunting of deer, moose, or elk or their processing into venison is not an agricultural activity and so, likewise, cannot support a child’s eligibility under the MEP.

**Changes:** The definitions of *agricultural work* in § 200.81(a) and *fishing work* in § 200.81(b) have been revised to remove the language “generally” and “in rare cases” from the last sentence of the definition.

**Section 200.81(c) In order to obtain.**

**Comments:** We received a number of comments about our proposed definition of *in order to obtain*. This term is used in section 1309(2) of the ESEA, which defines a migratory child as a child who is, or whose parent or spouse is, a migratory agricultural worker, including a migratory dairy worker, or a migratory fisher, and who in the preceding 36 months, has moved from one school district to another “in order to obtain” temporary or seasonal employment in agricultural or fishing work.

Believing that the statutory phrase “in order to obtain” means that MEP eligibility hinges on making a move for the purpose of seeking or obtaining this work, yet acknowledging that workers may move to a particular location for a number of reasons, the Secretary proposed in the NPRM to define the phrase “in order to obtain” more flexibly than in our current non-regulatory guidance. Specifically, while the current non-regulatory guidance

speaks of a worker’s “primary purpose” being to obtain temporary or seasonal employment in agricultural or fishing work, we proposed that *in order to obtain* mean that obtaining this work might be one of several purposes for the worker’s move.

Several of the commenters asserted that the proposed definition was inconsistent with legislative intent as well as language contained in earlier Departmental non-regulatory guidance, which provided, with a number of exceptions, that a move qualified if the worker had obtained the work “as a result of the move.” These commenters asserted that the Department’s rationale for proposing this change was incorrect, and that Congress included the phrase “in order to obtain” in the definition of a *migratory child* only to clarify that a family who moves to obtain qualifying work but is unable to obtain such work may still be eligible for the MEP.

Other commenters stated that the proposed definition would unduly complicate program eligibility determinations and, therefore, the definition was impractical and unreasonable. Some commenters suggested that the Department’s interpretation would require recruiters to interrogate families in order to probe their intent for making a move, which in turn would so alienate families that they would choose not to participate in the program—causing eligible children to go without MEP services.

Commenters also noted that permitting eligibility only if parents assert that the purpose of their move was to obtain qualifying work is problematic. They noted that workers often: may move for several reasons; may lack the education or language ability to explain the intent of a move; may be unwilling to disclose their intent; and may give different reasons for the same move depending on which family member is asked.

Several of the commenters recommended that the Department’s final regulations provide that a child is eligible for the MEP if a family simply moves across school district lines, obtains or seeks temporary or seasonal employment in agricultural or fishing work in the new district, and meets all other eligibility criteria. These commenters stressed that the family should not have to clearly articulate or demonstrate that one of the purposes of the move was to seek or obtain seasonal or temporary employment in agricultural or fishing work.

Other commenters recommended that the regulations be modified to provide that families who move with the intent of obtaining either non-qualifying work

or any work, but who subsequently obtain temporary or seasonal employment in agricultural or fishing work, should be eligible for MEP services.

**Discussion:** The Secretary continues to believe, as expressed in the NPRM [72 FR 25231], that the statutory definition of a *migratory child* in section 1309(2) of the ESEA requires that MEP eligibility be based on a worker’s move from one school district to another for the purpose of obtaining temporary or seasonal employment in agricultural or fishing work. The statutory definition applies to each child eligible for the MEP. While we have endeavored to do so, we simply are unable to read the phrase that a worker moved “in order to obtain” temporary or seasonal employment in agricultural or fishing work in such a way as those commenters, who wish to eliminate the need for the move to be made at least in part for a qualifying purpose or intent to move, would have us do. The statutory phrase “in order to obtain” can only mean purpose or intent, and the Department has no authority to interpret the statute otherwise. Moreover, we are aware of no legislative history that reveals that Congress intended the definition of a migratory child to mean something other than that the worker move “in order to obtain,” *i.e.*, with a purpose or intent of obtaining, after the move, temporary or seasonal employment in agricultural or fishing work.

Thus, we are unable to construe the phrase “in order to obtain” to apply only to workers who move and who only then look for or find temporary or seasonal employment in agriculture or fishing work. Similarly, we are unable to construe the phrase and its underlying concept of intent to apply only to those workers who move to seek but, thereafter, do not find temporary or seasonal employment in agricultural or fishing work.

However, the Secretary is satisfied that the regulations can be modified, consistent with the statutory language, to address and accommodate what we understand to be the commenters’ principal objections and objectives.

The Secretary recognizes the very real challenges SEAs face in determining and documenting, after the fact, whether or not each individual worker has moved in order to obtain temporary or seasonal employment in agricultural or fishing work. Any number of factors, including a family’s poverty, the inability to adequately articulate the English language, a desire for privacy, a desire for children to receive the supplemental services the MEP may

offer, or a need for employment of any kind even if realistically the worker is likely only to obtain temporary or seasonal employment in agricultural or fishing work, can significantly impair a recruiter's ability to discern through an interview whether or not a particular worker has moved "in order to obtain" work that can establish eligibility under the statute.

These final regulations include within the definition of *in order to obtain* not only (1) the provision that a worker who has moved (now for economic necessity) in order to obtain qualifying work if one of the worker's purposes in making a move was to obtain this work, but also (2) a provision that a worker who states that a purpose of the move was to seek any type of employment, i.e., the worker who has moved with no specific intent to find work in a particular job, but who finds qualifying work soon after the move, has moved "in order to obtain" qualifying employment. In making this change, we have considered the public comments, and drawn on prior discussions with MEP practitioners and knowledge we have gained reviewing audit findings regarding efforts to confirm MEP eligibility. We believe it is common knowledge that many migrant workers would accept a permanent job if they could find one, and state the same in general terms when interviewed to determine their children's eligibility for the MEP. Often, however, these same workers are unable, after a move, to obtain any employment other than temporary or seasonal employment in agricultural or fishing work and, therefore, accept such qualifying work. Indeed, the fact that these individuals find temporary or seasonal employment in agricultural or fishing work soon after they move can often be an indication of their intent in making a move.

The fact that these individuals may not express a clear intent to move and obtain qualifying work creates a tension with the statutory requirement that a worker must move "in order to obtain" such work. It also creates very evident costs and anxieties on the part of SEA and LOA officials and staff related to how to correctly determine and fully document that a worker meets the MEP's current definition of a *migratory worker*. In those situations where a worker's intent is not clearly expressed, the Department is satisfied that an SEA may infer that individuals who, for example, express only a generalized intent to have moved "for work" or "to obtain work," or would "take any job," or without any specificity "hope to find a permanent job" have in effect expressed that one of the purposes of their move is to obtain temporary or

seasonal employment in agricultural or fishing work. Of course, if an individual expresses a specific intent to obtain only a job in work that does not qualify under the MEP, a State could not determine that this individual moved in order to obtain the requisite qualifying work.

*Changes:* The Secretary has revised the definition of *in order to obtain* to provide that in circumstances in which a worker expresses an intent to have moved for any type of employment, as opposed to a specific intent to obtain only non-qualifying employment, an SEA may deem that one of the purposes of the individual's move was to obtain qualifying employment if the worker obtains such work soon after the move.

*Comment:* Two commenters expressed concern that the second sentence of the proposed definition of *in order to obtain* could be read as preventing those who do not have an offer or potential offer of employment in temporary or seasonal employment in agricultural or fishing work prior to moving from being eligible for the MEP. This sentence, as proposed, stated:

"A worker has not moved in order to obtain temporary employment or seasonal employment in agricultural work or fishing work if the worker would have changed residence even if temporary employment or seasonal employment in agricultural work or fishing work were unavailable."

Another commenter expressed concern that the proposed definition could be read in exactly the opposite way to exclude individuals who move knowing that they have a job, since they are not moving in order to seek or obtain work. This commenter was also concerned that the definition might exclude individuals who moved without knowing that the temporary or seasonal agricultural or fishing work they traditionally performed in a location was unavailable because of unusual circumstances such as a flood or a drought.

*Discussion:* The language of the proposed definition was not meant to restrict the eligibility of families migrating in any of the three scenarios presented by the commenters. However, to avoid any further confusion, and to promote program integrity, the Secretary has revised the definition to clarify that in the case where a worker does not secure qualifying work soon after a move, more information than just a statement by the worker is needed to confirm that the worker moved in order to obtain that qualifying work. Such additional information would be—either a prior history of moving to obtain qualifying work or, especially for those who never before migrated and so have

no work history, some other credible evidence that the worker actively sought the qualifying work soon after the move (e.g., a work application at various local farms or processors; a farmer's affirmation that the worker applied for work but none was available; newspaper clippings documenting a recent drought in the area).

*Changes:* The Secretary has revised the definition of *in order to obtain* to clarify that—

(1) If a worker states that a purpose of the move was to seek any type of employment, i.e., the worker moved without a specific intent to find work in a particular job, the worker is deemed to have moved with a purpose of obtaining qualifying work if the worker obtains qualifying work soon after the move, but that—

(2) A worker who did not obtain qualifying work soon after a move may be considered to have moved in order to obtain qualifying work only if the worker states that at least one purpose of the move was specifically to seek this work, and (a) the worker is found to have a prior history of moves to obtain qualifying work, or (b) there is other credible evidence that the worker actively sought qualifying work soon after the move but, for reasons beyond the worker's control, the work was not available.

#### *Section 200.81(d) Migratory agricultural worker.*

*Comments:* Several commenters expressed concern that the proposed removal of the phrase "including dairy work" from the definition of a *migratory agricultural worker* would lessen the acceptance of such work as an appropriate migratory activity even though the definition of *agricultural work* refers to "the production or initial processing of \* \* \* dairy products [emphasis added]." These commenters asked that the Secretary not remove this phrase.

*Discussion:* The proposed removal of the reference to dairy work from the definition of *migratory agricultural worker* was purely editorial given that the proposed new definition of *agricultural work* clearly includes the production and processing of dairy products. However, upon further consideration of the comments, the Secretary agrees to make the change requested by the commenter.

*Changes:* We have modified the definition of *migratory agricultural worker* to include a reference to "dairy work."

#### *Section 200.81(e) Migratory child.*

*Comments:* Several commenters expressed support for the proposed definition of a *migratory child*, noting

that it would be helpful in clarifying that an emancipated youth who moves in his or her own right as a migratory agricultural worker or a migratory fisher would meet the definition. One commenter stated that additional guidance would be necessary regarding how to document eligibility for these children who move on their own to seek or obtain temporary or seasonal agricultural or fishing work.

Two commenters asked that we clarify our statement in the preamble of the NPRM [72 FR 25231] that a migratory child includes both a child who accompanied a migratory worker and a child who has joined a migratory worker in a reasonable period of time. The commenters recommended that the Secretary provide a definition of “a reasonable period of time.” With respect to a child who joins a worker after the worker has moved, one commenter recommended that we revise the definition to clarify that this type of “to join” move includes a move where children move ahead of the parent—e.g., when a worker secures work in a new town that does not begin immediately but sends the child first to live with family or friends in the new town and so start school there without any educational disruption.

Finally, another commenter suggested that we revise the definition to specify that a migratory child is “a child or youth between \* \* \* 3 and 21 years of age.”

**Discussion:** The Secretary does not agree that it is necessary or desirable to (1) define in regulations how close in time to the parent’s move a child’s move must be in order to permit the child to have moved to join the migratory worker, or (2) address specific fact situations, such as when a move is made by a child in advance of a move made by the parent. These issues can be better and more fully addressed in non-regulatory guidance. Revising the definition to specify the age range of an eligible migratory child as between 3 and 21 is also not needed. First, the upper age limit of any “child” who would be served by the MEP and any other of the Title I programs is already established in the definition of *child* in the Title I regulations in 34 CFR 200.103(a). Moreover, the age range of 3 through 21 only applies to the migratory children counted and reported by the SEAs for purposes of determining the MEP State grant allocations using the formula under section 1303 of ESEA. Consistent with their comprehensive needs assessment and service delivery plan (see section 1306(a) of the ESEA and § 200.83), as well as § 200.103 (which allows services to preschool

children) and sections 1115(b)(1) and 1304(c)(2) of the ESEA (which allow services to children below school-age), SEAs may provide eligible migrant children below the age of three with MEP services.

**Changes:** None.

**Section 200.81(f) Migratory fisher.**

**Comments:** One commenter expressed concern that the proposed definition of a *migratory fisher* did not address several specific fact situations, such as when an individual involved in fishing crosses school district lines but does not leave the fishing boat, or when an individual makes a number of moves of short duration during the fishing season.

**Discussion:** The Secretary does not believe it is desirable or possible to have the regulations address specific fact patterns regarding migratory fishing, such as those the commenter raised. The issues raised by this commenter can be better and more fully addressed in non-regulatory guidance. The Department intends to issue such guidance following the issuance of these final regulations.

**Changes:** None.

**Section 200.81(g) Move or Moved.**

**Comments:** We received a number of comments on the proposed definition of *move or moved*. One commenter suggested that we delete the definition because it would not consider workers who move and return to previously held employment to have made a move for purposes of the MEP.

Several commenters generally agreed that travel for vacation, holidays, or other personal reasons unrelated to obtaining work should not be considered moves for purposes of the MEP. Some commenters, however, expressed concern about the meaning of the terms “vacation” and “holiday,” noting that these terms could be understood differently by migratory families and MEP administrators due to cultural differences. A number of commenters also expressed concern that the meaning of the phrase “during or after” a vacation or holiday was unclear and confusing. These commenters asked whether the use of the word “during” should be read to exclude all travel that occurs on or overlaps either a specific holiday such as Christmas, or that occurs during a scheduled school holiday or the summer vacation from school. Commenters noted that reading the definition in this manner could penalize families who wait for breaks in schooling to move so as not to cause their children to experience educational interruption. The commenters stated that using this definition as proposed could create a perverse incentive for families to make moves during the

school year in order to continue to be eligible for the MEP.

Commenters also said that they thought the word “after” in the phrase “during or after a vacation or holiday” was ambiguous. They asked if moving after a vacation or holiday meant that any move by a family “after” a vacation would not be considered a move for purposes of the MEP, or how long a period after a vacation or holiday must pass before a family’s next move to seek or obtain temporary or seasonal agricultural or fishing work would be considered a move for purposes of the MEP. One commenter expressed the opinion that the time at which a move occurs is irrelevant so long as the move meets the basic conditions in the statute. Various commenters noted that some migrant families move for work during a school vacation period, and some suggested revising the definition either to delete the phrase “during or after a vacation or holiday” entirely or to clarify what we mean by the phrase. In that regard, two commenters suggested that we consider the fact that in some cultures travel of more than 30 days, without pay, and with a clear break in employment would not be considered a vacation.

Several commenters noted that the proposed definition of *move or moved* was inconsistent with the proposed definition of *in order to obtain*. They commented that the proposed definition of *move or moved* did not allow travel for certain specific reasons—i.e., vacations or holidays, or any personal reasons unrelated to seeking or obtaining temporary or seasonal employment in agricultural or fishing work—while the proposed definition of *in order to obtain* would more generally have allowed a move to be made for multiple purposes so long as one of the purposes was to seek or obtain temporary or seasonal employment in agricultural or fishing work. The commenters expressed concern that the proposed definition of *move or moved* could prevent a family from qualifying for the MEP if it moved both to seek or obtain temporary or seasonal employment in agricultural or fishing work and for another personal reason. One commenter suggested revising the definition to clarify that moves that occur *only* as a result of a vacation, holiday or other personal reasons are not considered to be moves for purposes of the MEP even if temporary or seasonal employment in agricultural or fishing work is sought or obtained.

Finally, two commenters asked that we clarify the meaning of the term “residence” and the phrase a “change from one residence to another

residence” in the proposed definition. They variously recommended that the Department clarify whether boats, vehicles, tents, trailers, or relatives’ homes would be considered residences under the definition. Given these considerations, a commenter suggested changing the term “residence” to “location.”

**Discussion:** The statutory definition of *migratory child* in section 1309(2) of the ESEA, as in all similar definitions contained in prior authorizations of the MEP, focuses on the need for a worker to move in order to obtain certain kinds of employment. Yet, recent audit findings<sup>1</sup> have highlighted situations in which children were found eligible for the program based on moves, such as those made during periods of school vacations, that a family makes in order to return to the children’s regular school community. Given the desirability of clarifying when a move of this kind can qualify a child for MEP eligibility and when it cannot, the proposed regulations were designed to identify more clearly those situations in which a family’s move would not be sufficient to establish MEP eligibility.

In reviewing the comments, the Secretary agrees that the proposed definition was inconsistent with the definition of *in order to obtain*. To address the concerns raised by the commenters, we are revising the definition of *move or moved* in the final regulations to provide that the change must be from one residence to another residence that occurs due to economic necessity. This change fits the purposes of the MEP and clarifies that for the MEP, a move that is not made due to economic necessity is not a “move” for purposes of MEP eligibility. With this change, it is not necessary to address in the regulations the particularities of moves that were made for vacation, holiday, or personal reasons unrelated to the family’s economic need. This change also eliminates the inconsistency between this definition and the definition of *in order to obtain*.

The Secretary agrees it will be useful to provide clarification about what constitutes a residence, as well as what constitutes economic necessity. These clarifications—as well as others, such as when and how to recognize a move that constitutes a true vacation (e.g., to/from a resort, visits to family and friends) and thus does not involve economic necessity—will also be provided in non-regulatory guidance

following issuance of the final regulations.

**Changes:** The Secretary has revised the definition of *move or moved* to provide that, for purposes of establishing eligibility under the MEP, a move must be a change from one residence to another residence that occurs due to economic necessity.

**Section 200.81(h) Personal subsistence.**

**Comments:** Several commenters supported the proposed definition of personal subsistence. Other commenters expressed several concerns. One commenter said that the phrase “in order to survive” is somewhat subjective and may set a different standard than is required for “principal means of livelihood.” Another commenter asked whether the definition requires a differentiation between a worker and grower, and a farmer or consumer, and whether a person who works land he or she leases would be covered under the definition. Two of the commenters recommended either removing the definition of *personal subsistence* or changing the phrase “in order to survive” to “as an important part of personal consumption.”

**Discussion:** The Secretary agrees that the language of the proposed definition did not adequately describe the concept of personal subsistence, and we have revised the definition to provide a better description. However, in making the revisions, the Secretary does not agree that the differences between worker, grower, farmer, consumer or leaseholder are relevant to, or need to be specifically addressed in, this definition. We believe that these differences are clear in the definitions of *agricultural work* and *fishing work*, which specifically provide that the work must be performed only for wages or personal subsistence.

**Changes:** We have revised the definition of *personal subsistence* to provide that the worker and his or her family, as a matter of economic necessity, consume, as a substantial portion of their food intake, the crops, dairy products, or livestock they produce or the fish they catch.

**Section 200.81(i) Principal means of livelihood.**

**Comments:** Several commenters recommended that we eliminate the definition of *principal means of livelihood* and remove the term from the definitions of *migratory agricultural worker* and *migratory fisher*. (Those definitions had provided that the temporary or seasonal employment in agricultural work or fishing work a migratory worker obtains must be a “principal means of livelihood”—i.e.,

that it must play an important part in providing a living for the worker and his or her family.) Three commenters questioned the legal basis for this regulatory requirement. Several commenters were concerned that requiring the qualifying work to be a principal means of livelihood might be interpreted in some places as requiring an income or means test for determining MEP eligibility. Another commenter suggested that the definition is unnecessary because it is clear most migratory families live in extreme poverty, and because the questions some recruiters may ask to determine principal means of livelihood can be viewed by the migratory families as offensive and intrusive and can lead to refusals to participate in the program.

**Discussion:** The proposed definition of *principal means of livelihood* is in the current regulations and we did not propose to modify it in the NPRM. As discussed at length in the preamble to the final regulations for the MEP published in the **Federal Register** on July 3, 1995 [60 FR 34826], the Department established the principal means of livelihood requirement to ensure that, consistent with congressional purpose, the MEP focuses on children who have a significant economic tie to migratory agricultural or fishing work. This said, upon consideration of the comments, the Secretary agrees that, with the other changes being made to these regulations, the principal means of livelihood requirement is no longer needed. The Secretary believes that the other changes, which clarify that a migratory agricultural worker or a migratory fisher is a person who moves due to economic necessity in order to obtain temporary or seasonal employment in agricultural or fishing work, will satisfactorily address the purpose of the principal means of livelihood requirement.

**Changes:** The definition of *principal means of livelihood* in proposed § 200.81(i) has been deleted and the term has been removed from the definitions of *migratory agricultural worker* and *migratory fisher*.

**Section 200.81(i) Qualifying work.**

**Comments:** None.

**Discussion:** As revised, the definition of the phrase *in order to obtain* would be very cumbersome without a term that could be used to abbreviate the phrase “temporary employment or seasonal employment in agricultural work or fishing work.” We believe the public generally understands this longer phrase to mean “qualifying work,” and so we are including a new definition of this term in these final regulations.

<sup>1</sup> See, e.g., the Department’s Office of Inspector General audit of the California MEP, report No. ED OIG/A05G0032.

*Change:* A new definition of *qualifying work* has been added in new § 200.81(i) that provides that such work means temporary employment or seasonal employment in agricultural work or fishing work.

*Section 200.81(j) Seasonal employment.*

*Comments:* Two commenters supported our proposed definition of *seasonal employment*. However, several others expressed concern that the definition was too narrow because it indicated that the employment is dependent on the cycles of nature due only to the specific meteorological or climactic conditions. One commenter suggested that this definition did not account for work that is seasonal in nature due to choices made by the employers or the workforce. Three other commenters expressed concern that the emphasis on “specific meteorological or climatic conditions” was too limited because some crops, such as mushrooms, are grown indoors and, therefore, would not be affected by meteorological or climatic conditions. Commenters also noted that other crops, such as citrus fruit and other crops grown in warmer climates such as Florida and California, have to be harvested because of their specific growth cycle rather than due to meteorological or climatic conditions. Another commenter noted that Webster’s dictionary defines a “season” as “a period of the year characterized by or associated with a particular activity or phenomenon.” Two commenters noted that fern harvesting in Volusia County, Florida is an example of a seasonal activity that is an established annual pattern or event that occurs between November and June not because of weather conditions but because holidays occurring during that time create a higher demand for ferns.

One commenter recommended that the Secretary either not define the term or conduct a study of the range of seasonal employment so as to develop a better definition. Other commenters suggested amending the definition to include other reasons for seasonal farmwork such as growth cycles. Another commenter suggested changing the word “meteorological” to “weather.”

*Discussion:* While disagreeing with some of the commenters examples, which the Secretary believes are “temporary” rather than “seasonal” employment, the Secretary agrees with the commenters that the language of the proposed definition may have been too limited. The Secretary has revised the definition to reflect the commenters’ underlying concerns, and a definition of

*seasonal employment* used by the Department of Labor [see 29 CFR Section 500.20(s)(1)], so as to better describe what constitutes seasonal employment.

*Changes:* The definition of *seasonal employment* has been changed to state that seasonal employment is employment that occurs only during a certain period of the year because of the cycles of nature and that, by its nature, may not be continuous or carried on throughout the year.

*Section 200.81(k) Temporary employment.*

*Comments:* Many commenters expressed concern about the provision in § 200.81(k) that an SEA may only deem specific types of employment to be temporary if it (1) documents through an annual survey that, given the nature of the work, virtually no workers who perform this work remain employed more than 12 months even if the work is available on a year-round basis, and (2) conducts this survey separately for each employer and job site. Commenters stated that conducting the proposed annual survey at each job site would be extremely costly and labor-intensive, particularly on dairy farms, because of the large number of sites at which States would be required to conduct the survey. Some commenters suggested that there would be substantial administrative costs and staff time associated with conducting the annual surveys and that, because the proposed regulations would not have provided for additional funds to pay for costs of conducting the surveys, the proposal would adversely affect the level of MEP services States could provide to needy children.

Several other commenters observed that the proposed survey requirement represented an extreme and unwarranted change to existing Department practice, would be highly burdensome, and would eliminate many families from being identified or served. Still other commenters stated that the proposed requirement to conduct annual surveys (by individual job site) would be impossible to implement because employees and employers are often unwilling to give an SEA complete and valid data about turnover rates. One commenter questioned the practicality of expecting SEAs to conduct valid surveys of each employer and site. Two commenters noted that at every livestock processing plant in the Nation there are at least several workers who remain employed year round, and the commenter expressed concern that no child of a worker in these plants would be eligible to receive MEP services under the proposed regulation.

*Discussion:* While section 1309(2) of the ESEA requires that a migratory worker move in order to obtain temporary or seasonal employment in agricultural or fishing work, the law does not define “temporary” employment. As explained more fully in response to other comments, the temporary nature of employment that is sought or obtained is generally determined either by the worker or the employer. However, the Department also recognizes that there are other jobs, such as may exist in processing plants or dairy farms, in which the employment is constant and year-round but for various reasons workers typically do not stay long at these jobs.

In consideration of employment in these kinds of jobs, the Department developed another way SEAs may determine that the employment an individual seeks or obtains is “temporary” for purposes of the MEP. In particular, the Department’s most recent non-regulatory guidance permits SEAs, for jobs that are constant and year-round, to determine the work to be temporary on the basis of an “industrial survey” that establishes, from personnel data supplied by employers, a high turnover rate—at levels specified by the Department—for each job category.

The Secretary’s proposal in the NPRM responded to widespread dissatisfaction of local, State, and Federal program officials with this guidance. Much of this dissatisfaction has been due to the great difficulties, if not impossibility, of State or local MEP staff obtaining turnover data from employers, and the lack of completeness and accuracy of the data that employers did provide. The proposed regulation would not have required employers to provide such data. Indeed, the preamble to the NPRM [72 FR 25232] clarified the Secretary’s intent that the necessary attrition data could be easily obtained from workers when SEA or local MEP staff conduct their annual updates to confirm eligibility and continued residency of eligible children identified previously—a task they regularly perform in order to compile accurate SEA and local program child counts and to determine if new qualifying moves have been made. Thus, the Secretary believes that the regulations as proposed addressed those pre-existing concerns and similar concerns raised by the commenters.

Moreover, the Secretary does not believe that there will be substantial additional costs and data collection burden associated with the process the regulation permits for validating whether certain types of year-round work can be considered temporary

employment. Notwithstanding our use of the word survey in the proposed definition of *temporary employment*, we did not intend the validation process to be a complex and expensive effort that would require SEAs to gather a large amount of detailed personnel data annually from employers or workers. Rather, as imperfectly explained in the NPRM [72 FR 25232], we envisioned that this validation process would involve asking only those workers whose children were determined eligible based on the seemingly year-round jobs that the State had previously designated as temporary (or the children themselves if they are the workers) the following simple question: has the worker remained employed by the same employer for more than one year.

After further consideration of the comments, however, the Secretary believes that this definition can be revised to provide greater flexibility for States and still ensure that program objectives related to ensuring that workers are legitimately considered to have moved “in order to obtain” a “temporary” job are met. Accordingly, we have revised the definition to provide that instead of having to conduct annual surveys to document the temporary nature of work that is seemingly constant and year-round, an SEA now need only document, within 18 months after the effective date of this regulation and at least once every three years thereafter, that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State’s prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

We will provide further details about recommended procedures—such as combining the process to validate that particular types of employment are temporary with existing eligibility checks and updates, and whether all or a sample of employers or job sites should be examined—in non-regulatory guidance.

*Change:* The Secretary has revised the definition of *temporary employment* to clarify how an SEA may determine specific types of constant and year-round employment to be temporary. The SEA may do so if it documents, within 18 months after the effective date of this regulation and at least once every three years thereafter, that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State’s prior determination of the temporary nature

of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

*Comments:* With respect to States’ determination of whether certain year-round employment would be considered temporary, we asked in the NPRM for input on whether the terms “a few months” and “virtually no workers \* \* \* will remain employed more than 12 months” should continue to be used for the final regulation, or whether and what firmer time limits, numbers, or percentages might be used instead. Several commenters responded to this question by recommending that these terms be removed because, as written, they were too vague, would create confusion, could provide opportunities for abuse, would be expensive to implement, and would exclude a large percentage of children currently considered eligible for the MEP by their States.

Several commenters asked the Department to clarify the meaning of the term “virtually no workers.” One commenter suggested that the term is not quantifiable, and another indicated that a given percentage of employees leaving over the course of a year may be more or less significant given the overall size of the processing plant. Still another commenter expressed the opinion that, even though the Department indicated in the preamble to the NPRM that the term was used to avoid setting arbitrary limits, the term is tantamount to establishing an arbitrary 100 percent rate.

Several commenters stated that it would be nearly impossible to classify food processing or dairy-farm work as temporary under the proposed definition because most processing plants and dairy farms employ at least a few workers for longer than 12 months. One commenter noted that the Department’s own study of processing<sup>2</sup> indicates that poultry processing has turnover rates from 50 percent to over 100 percent.

Some commenters recommended either eliminating the proposed definition entirely and continuing to rely on the procedures outlined in current non-regulatory guidance, or establishing the non-regulatory guidance procedures by regulation. In this regard, several commenters recommended using the provisions of the industrial survey process contained in the current non-regulatory guidance,

which specify a job as temporary if an employer provides information to the SEA that the job has greater than a 50 percent annual turnover rate. In the commenters’ opinions, the industrial survey process described in the current non-regulatory guidance establishes a clearer and easier method for determining whether year-round employment is temporary. Two commenters offered the opinion that a turnover rate of greater than 50 percent was a clear indication of the temporary nature of work. Another commenter suggested using a turnover rate of 75 to 100 percent.

*Discussion:* The Secretary appreciates the commenters’ responses to the question in the NPRM. We do not agree, however, that the terms “virtually all” and “a few months”—as used in the definition of *temporary employment*—are overly vague or confusing or that they will result in abuse or excessive costs. While the terms “virtually all” and “a few months” are neither exact nor precisely quantifiable, these terms should be read to mean that 100 percent, or nearly 100 percent, of workers with children identified as eligible under the program stay on the job generally for only a brief period of weeks or months, and only rarely stay for 12 months. The Secretary does not believe it is desirable to establish further regulatory limitations relative to these terms. Rather, as noted in the NPRM [72 FR 25232], the regulatory language will allow SEAs the flexibility they need to address situations such as the one raised by several commenters whereby a few workers in the dairy and food processing industries may remain employed by the same employer somewhat beyond 12 months. Moreover, by not requiring that 100 percent of workers no longer be employed after 12 months, the regulation will allow the SEA to exercise some discretion to determine whether specific job categories can reasonably be considered temporary employment.

As we have noted previously, the Secretary does not agree that procedures to determine whether specific types of year-round work are temporary will be expensive to implement, but we have revised the language of the definition to give greater flexibility as to how to do so.

The Secretary also does not agree with the suggestions that turnover rates of “greater than 50 percent” or “75 to 100 percent” over a 12- or 18-month time period, as reflected in the Department’s prior guidance for the MEP, are better measures for determining the temporary nature of work. As explained elsewhere in this preamble, such turnover rates,

<sup>2</sup> RTI International: “Literature Review: Agricultural and Fish Processing,” June, 2004. [Prepared for the U.S. Department of Education].

based on data that employers have provided to the SEAs, are flawed. In this regard, according to information the Department received during a 2004 meeting with representatives from various processing industries, it appears that their job turnover rates usually only take into account movement of workers in or out of a particular job; they do not usually account for situations in which the particular worker continues to remain employed by the employer at the same work site in a succession of jobs and, thus, is actually a permanent employee. Under this methodology, persons initially hired in jobs considered temporary based on high reported turnover rates as measured based on this flawed job turnover rate metric may in fact remain employed by the same employer for years—a situation indicative of permanent (constant year-round), not temporary, employment. Thus, continuing to rely on job-specific turnover rates is inappropriate. Given the flawed nature of the job turnover rates, the Secretary believes that examining whether persons hired to perform such jobs that the SEA believes, on some credible basis (such as market research), to be temporary employment continue to be employed for more than a year would be a better measure of whether it is reasonable to continue to identify and serve such workers' families under the program.

Also, the Secretary notes that allowing the use of a turnover rate as low as 50 or 75 percent to establish a particular job as temporary employment would extend program eligibility to a substantial number of children (i.e., the children of the 25 or 50 percent of workers who remain employed year-round) who would not meet the definition of *migratory child* and therefore should not be considered eligible for the MEP. The Secretary therefore believes that the turnover rates specified in the current non-regulatory guidance are too low to establish the temporary nature of the work for the purpose of extending eligibility to the children of all workers in these jobs.

*Change:* None.

*Comments:* In the preamble to the NPRM [72 FR 25232], we also asked for input as to whether there are additional regulatory requirements that would improve the proposed annual survey by improving the quality and consistency of the data or by providing more effective methods to collect the data. In response, two commenters recommended that the definition of *temporary employment* be qualified by inserting the phrase “usually lasting no longer than 12 months” which is

consistent with the definition of *temporary employment* in the current non-regulatory guidance. Other commenters proposed that the definition of *temporary employment* include jobs that last for more than 12 months if a State can demonstrate either high turnover rates or a pattern of temporary work at the work site or by the worker. Two other commenters suggested that the time period for a job to be considered temporary be extended to 18 months. These commenters noted that, in some industries such as dairy, temporary employment can last for longer than 12 months and that the Department's proposal, consequently, would substantially reduce the number of eligible migrant children in certain geographic areas.

*Discussion:* Given that eligibility for the MEP depends on a worker's move to a new location in order to seek or obtain temporary or seasonal employment in agricultural or fishing work, the Secretary believes that the time period in which individuals work in these jobs should be brief and not reflect employment that is constant and year-round. While reflecting an approach that is more precise and less flexible than is contained in the non-regulatory guidance, the Secretary believes that someone who works for 12 months has year-round employment, and as such, 12 months represents the outside limit for distinguishing temporary employment from non-temporary employment. The Secretary believes this same 12-month limit should be applied to the validation process for determining whether certain types of employment available year-round can reasonably be deemed temporary. The Secretary notes that this requirement on the length of temporary work is consistent with the Department of Labor's definitions of temporary work in 29 CFR 500.20 and 20 CFR 655.100 for its migrant and seasonal farmworker programs.

Given that the Secretary expects temporary employment to usually last briefly—for a few months—and that temporary employment lasting as long as 12 months is expected to be a rarity, the Secretary agrees to add the phrase “but no longer than 12 months” to the definition. However, as explained above, the Secretary cannot agree that employment that lasts for more than 12 months—e.g., for 18 months—should be considered temporary, and so also cannot agree that the period should be extended even if an SEA can demonstrate for this longer period either high turnover rates or a pattern of temporary work at the work site or by the worker. Of course, if a worker

expresses an intent to have moved in order to work for a period of a few months (not greater than one year), the SEA could find the worker to have moved in order to obtain temporary work on the basis of the worker's purpose in making the move rather than on the basis of documenting attrition in such employment.

We turn finally to comments expressing concern about the impact an absolute 12-month rule would have on children of workers in industries like the dairy industry, where workers are reported to stay in jobs somewhat longer than 12 months. While the commenters expressed concern about the impact of a definition of *temporary work* that is limited to 12 months, they offer no specific data to corroborate their statements. The Secretary believes that establishing a 12-month time period is not only reasonable, but is concerned that, absent establishment of this time period, SEAs will continue to extend MEP eligibility to individuals who have moved to a new location with at best only a marginal purpose of obtaining temporary or seasonal employment. Given this concern about program integrity, the Secretary declines to accept the recommendation that the 12-month period be extended to 15 or 18 months.

*Change:* We are modifying the definition of *temporary employment* to clarify that such employment is for a limited period, usually lasting only a few months, and cannot last longer than 12 months.

*Comment:* One commenter expressed concern about how the proposed validation process could be implemented in that, given the retrospective nature of the proposed annual survey, an SEA would need to wait a year to determine if a job could be considered temporary and, by then, the family will have moved away. The commenter suggested that the process, as proposed, was therefore unworkable.

*Discussion:* The Secretary recognizes the commenter's concern; however the final regulation will require documenting the attrition only of those workers whose children were determined eligible (or the children themselves if they are workers) based on the workers' employment in those year-round jobs that the SEA, consistent with these regulations, had *previously* designated as temporary on some reasonable basis. If the SEA tries to question these workers 18 months later, the Secretary would agree the SEA may infer that those workers who have moved away and cannot be located are no longer employed at the same plant. These workers, then, would be deemed

to be part of the plant's worker attrition for that year and, so, would help support a determination that employment in that plant was temporary.

*Change:* None.

*Comments:* Several commenters recommended that States not be required to conduct annual surveys and should instead be allowed to establish their own methodology and criteria to document the temporary nature of employment. One commenter noted that States are in a better position than the Federal government to gauge local industry and substantiate whether employment is temporary. One of the commenters suggested that one way that States should be allowed to certify year-round work as temporary would be through providing additional information on a supplemental form. Another suggested that we require States to conduct surveys to gather turnover rates every three years, as currently recommended in non-regulatory guidance, or permit recruiters to find work to be temporary based on conversations with other workers who confirm a high turnover rate. The commenter believed that these would be more realistic options than requiring the retrospective annual survey proposed in the NPRM.

*Discussion:* As stated previously, the Secretary strongly believes that whether they are implemented once every three years or annually, the procedures for calculating turnover rates as described in the Department's current non-regulatory guidance for the MEP are unacceptably flawed. Therefore, the Secretary declines to make the specific change suggested by the commenter.

However, the Secretary generally agrees that the final regulations can provide more flexibility regarding how an SEA may determine and validate the temporary nature of agricultural or fishing work. In particular, we are removing from the proposed regulation references to various examples of types of temporary employment and the suggestions that these are the only kinds of employment that can be considered temporary on the basis of a survey. Instead, the final regulations focus on the use of credible sources of information, including worker and employer affirmations as well as other reasonable determinations by the SEA. They also eliminate the references to an annual survey of employment that might be deemed temporary, notwithstanding that it appears to be constant and year-round, to be conducted separately for each employer and job site. Instead, these final regulations require SEAs to document,

within 18 months of the effective date of these regulations and at least once every three years thereafter, that such employment can continue to be deemed temporary because virtually no workers whose children were determined eligible on the basis of such work deemed temporary (or the children themselves if they are such workers) remained employed by the same employer for over 12 months.

*Change:* The Secretary has revised and simplified the definition of *temporary employment* by clarifying that: (1) such work is conducted for a limited time frame—usually only a few months but no longer than 12 months—as stated by the employer or the worker, or as otherwise determined by the SEA on some reasonable basis; and (2) any work that is constant and year-round can only be considered temporary if the SEA, within 18 months after the effective date of this regulation and at least once every three years thereafter, documents that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State's prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

*Comments:* Three commenters requested clarification about the type of documentation a State would need to provide and the type of tests that a State would need to conduct to classify year-round employment as temporary. Commenters requested that the final regulations specify the content of the survey, the type of survey required, and the dates when surveys would be conducted.

*Discussion:* The Secretary appreciates the commenters' detailed and constructive suggestions but believes that, given the greater flexibility now afforded by the final regulations, it would be better to address the commenters' concerns in non-regulatory guidance to be issued after the final regulations are issued.

*Change:* None.

*Comments:* Two commenters suggested that the States' recent voluntary changes in quality control processes including re-interviewing, as well as such research as a Departmental study of the poultry processing industry,<sup>3</sup> should be sufficient to demonstrate to the Department that processing is temporary employment.

*Discussion:* The Secretary believes that neither the State's recent quality

control improvements nor the research and information the Department has collected on the processing industries provide an adequate basis for the Department to conclude that the work that occurs at each processing plant throughout the Nation is temporary. In fact, based on discussions with researchers and meat-processing industry representatives, it is the Department's understanding that the degree to which a particular work activity in agricultural or fish processing is temporary or permanent varies greatly from plant to plant because of differences in how each site carries out the work activity (e.g., with a greater or lesser degree of mechanization) and the particular working conditions provided in each plant (e.g., salary, benefits, opportunities for advancement). Accordingly, the Secretary will require SEAs to use the validation process described in the final regulations.

*Change:* None.

*Section 200.83 Responsibilities of SEAs to implement projects through a comprehensive needs assessment and a comprehensive State plan for service delivery.*

*Comments:* Several commenters addressed our proposal to require that an SEA include measurable program outcomes tied to the State's performance targets in its MEP Comprehensive Needs Assessment and Service Delivery Plan. One commenter stated that, while the proposed change seemed to assume that MEP services do not have measurable program outcomes, the proposed language was redundant with statutory requirements given that all States are required to include migratory children in the State accountability system. Three of the commenters stated that they recognize that there should be measurable program outcomes for MEP services. However, they also noted that the supplemental nature of the MEP—the fact that it often offers services for a relatively short period of time (e.g., in a summer program), at a limited level of engagement (e.g., in a 50-minute tutoring session three times a week during the regular school day), and through support services that are educationally related but are not themselves necessarily instructional—requires that any measurable program outcomes and performance targets for the MEP be realistic, and should not require precise quantification of results. These commenters were concerned that the proposed regulatory provision was overly inclusive and believed the Department should not overreach in its expectation that grantees establish quantifiable program goals, outcomes and targets.

<sup>3</sup> RTI International, op. cit.

*Discussion:* The Secretary recognizes the supplemental nature of the MEP. As noted in the preamble to the NPRM [72 FR 25233], the proposed change to § 200.83 simply conforms the regulatory language with the language in section 1306(a)(1)(D) of the ESEA, which requires that an SEA's comprehensive plan include both the specific performance targets it has established for all children (including migratory children) and its measurable program outcomes relative to those targets for the MEP. The change eliminates any ambiguity about whether a State must address measurable program outcomes in the MEP comprehensive plan that may have resulted from the inadvertent omission of the requirement in the prior regulations.

*Changes:* None.

*Section 200.89(a) Allocation of funds under the MEP for fiscal year (FY) 2006 and subsequent years.*

*Section 200.89(a)(1).* Several commenters addressed our proposal in this section under which the Secretary would adjust, for purposes of making FY 2006 and subsequent year MEP awards, each SEA's FY 2002 base-year allocation by applying a defect rate established through a State re-interviewing process to the State's 2000–2001 base-year child counts.

*Comments:* Four commenters questioned whether it was appropriate for the Department to change, through regulations, the statutory procedure for calculating the FY 2006 allocations when several States have not conducted re-interviewing or submitted defect rates to the Secretary.

*Discussion:* The Secretary appreciates the commenters' concern. However, this concern is largely addressed by the requirement in § 200.89(b)(1), which requires those few States that have not carried out a voluntary re-interviewing process and submitted a defect rate to the Secretary to do so as a condition for their continued receipt of MEP funds. We also note that currently only three States have not submitted defect rates, and one of these States, Rhode Island, has indicated it no longer wishes to operate an MEP because of its small number of migratory children.

*Changes:* None.

*Comments:* Two commenters expressed concern about using the State-reported defect rates established through the voluntary re-interviewing process to adjust the 2000–2001 base-year child counts because a standard process was not employed by all States. Both commenters were concerned that not all States used independent re-interviewers. One of these commenters recommended that the Secretary require

that every State use an independent re-interviewer to establish the State's defect rate. In this regard, the commenter noted that the Department was using an outside contractor to review the processes States used to develop their defect rates, and expressed the opinion that this use of a contractor reflected dissatisfaction by the Department with the defect rates as generated by disparate procedures. In the commenter's view, using the existing defect rates, which States developed using imperfect and disparate procedures, to adjust funding would be inappropriate.

*Discussion:* As noted in the NPRM [72 FR 25234], the Secretary recognizes that the State defect rates the Secretary ultimately accepts will not perfectly correct the 2000–2001 migrant child counts. However, the Secretary firmly believes that their use will result in the distribution of FY 2006 and subsequent-year MEP funds in a way that better reflects the intent of the statutory allocation formula than would continued use of the original 2000–2001 base-year counts.

As the commenter noted, the Secretary has used an outside contractor to review the SEA-submitted defect rates and the SEAs' associated re-interviewing and calculation procedures. However, this was done in order to obtain independent expert opinion as to whether each SEA's submitted defect rate was based upon adequate procedures and sufficient technical rigor.

While it is true that not all SEAs submitting defect rates used independent re-interviewers, the Secretary does not believe that the decision not to do so should necessarily invalidate the defect rates they reported. Due to the voluntary nature of the re-interviewing initiative, the Secretary does not believe it is reasonable—or necessary—to require retrospective re-interviewing by all SEAs that did not use independent re-interviewers provided the Secretary is satisfied that the process an SEA used met reasonable standards for technical rigor and gives confidence that the reported defect rate is itself reasonable.

However, under paragraph (b)(1) of this section, the Department will require any State with a defect rate the Secretary determines to be unacceptable, or that used procedures the Secretary determines to be unacceptable, to conduct another statewide retrospective re-interviewing process. As the regulations are intended to ensure that these SEAs do this work in ways that are statistically and methodologically sound, this process

will need to include, as a required element, the use of independent re-interviewers.

*Changes:* None.

*Comments:* Two commenters questioned the appropriateness of continuing to base FY 2006 and subsequent year allocations on the 2000–2001 child counts. These commenters expressed concern that doing so would not appropriately direct MEP funding to States that have experienced substantial increases in their migratory child populations over the intervening years. The commenters noted that the estimated ten percent national average defect rate clearly suggests that non-eligible children are being served in many States at the expense of eligible children and that the use of the current formula does not allow the funds to flow appropriately to eligible children in the commenters' States. The commenters proposed that the provisions of the statute requiring allocations after FY 2002 to continue to be based on the 2000–2001 child counts be amended to provide that funds “follow the child” based on use of updated yearly counts of migratory children.

*Discussion:* The Secretary understands that the continued use of base-year allocation amounts derived from the States' 2000–2001 migrant child counts does not reflect the current distribution of migratory children in the States. However, unless the Secretary knows that a State would be receiving more MEP funds than it needs (see section 1303(c)(2)(A) of the ESEA), section 1303(a)(2) of the ESEA requires the continued and exclusive use of the base-year counts for any fiscal year in which Congress has appropriated MEP funds in an amount less than or equal to the amount it appropriated for FY 2002. As the commenters note, eliminating the use of the base-year counts requires a statutory change. In this regard, the Department has requested that Congress, in the upcoming ESEA reauthorization, eliminate the requirement to make the MEP allocations using base-year child counts.

*Changes:* None.

*Comment:* One commenter recommended revising the regulations to permit, as was permitted under the ESEA as reauthorized in 1988 (Pub. L. 100–297), a State to have up to a five-percent error rate in its counts of eligible migratory children before the Department could impose any type of allocation adjustment. The commenter stated that a zero-percent error rate is unrealistic and that every industry has some non-zero error rate.

*Discussion:* While section 1201(b)(1) of the ESEA as reauthorized by Public Law 100–297 (the Hawkins Stafford School Improvement Amendments of 1988) contained a provision for a five-percent error rate in State eligibility determinations, this provision was removed when Title I, Part C of the ESEA was subsequently reauthorized by Public Law 103–382 (the Improving America's Schools Act). The provision also is not part of the current ESEA, and the Department does not have authority to adopt it by regulation. Such a regulation would also conflict with the clear intent of the statute that only children who meet the statutory definition of a migratory child may be identified and served with the limited funds appropriated for the MEP.

*Changes:* None.

*Comments:* While acknowledging that in some situations States made errors, both intentional and negligent, in determining the eligibility of students for the MEP, three commenters questioned whether the Department should be using the term “defect rate” to describe the findings of a State’s re-interview process. These commenters suggested that the term “disparity rate” would be more appropriate because the rates do not in all cases demonstrate clear errors in eligibility but may simply represent a disparity between written records of eligibility determinations made several years ago and more recent attempts to verify the information by new interviews. The commenters noted several possible procedural and cultural reasons for the disparities, including the considerable time lag between the initial eligibility determinations and the re-interviews, a lack of adequate monitoring, and a lack of clarity in certain eligibility criteria provided by the Department.

*Discussion:* The Secretary recognizes and appreciates the concerns raised by commenters but does not believe that the suggested change should be made. In the various announcements, guidance documents, and oral presentations the Department has made and provided to SEA officials on the re-interview initiative, the Department asked each State to determine, on the basis of reasonable sampling and re-interview procedures, its “defect rate”, i.e., the percentage of children in a State’s re-interview sample that the SEA determined to be ineligible under its re-interview process. While acknowledging that an SEA’s efforts might be subject to subsequent audit, the Department specifically left to each SEA the decision to determine when a disparity in the information received should be reflected in its State defect rate. The

Secretary is confident that the States understood the meaning of “defect rate” when they undertook their efforts and that the phrase “defect rate”, as used in the NPRM and these regulations, is appropriate.

*Changes:* None.

*Section 200.89(a)(2).* Four individuals or organizations submitted comments on § 200.89(a)(2), which would require SEAs to use the results of the retrospective re-interviewing to conduct a thorough re-documentation of the eligibility of all children for the MEP (and the removal of all ineligible children) included in the 2006–2007 MEP child counts.

*Comment:* One commenter requested clarification of the term, “thorough re-documentation.” The commenter stated his belief that given the cost of re-interviewing a sample of the State’s migrant children, re-documenting the eligibility of all children in the State’s migrant child count would be very expensive.

*Discussion:* As discussed in the preamble to the NPRM [72 FR 25234], the Secretary intended the proposed requirement to conduct “a thorough re-documentation” to mean that, after completing its retrospective re-interviewing, an SEA would examine its rolls of all currently identified migratory children and remove from the rolls all children it judges to be ineligible based on the types of problems identified in its retrospective re-interviewing as causing defective eligibility determinations. The Secretary expects that an SEA will be able to undertake this re-documentation effort, at little additional cost, when it carries out its annual activities to examine whether children previously identified as eligible in a prior performance year (and who would retain eligibility based on a 36-month eligibility period following a migratory move) still reside in the State and so are still eligible to be counted and served under the program. The Secretary has revised the language of this requirement in the final regulation in order to better explain the process required.

*Changes:* The Secretary has revised § 200.89(a)(2) to clarify that in carrying out the re-documentation, an SEA must examine its rolls of all currently identified migratory children and remove from the rolls all children it judges to be ineligible based on the types of problems identified in its statewide retrospective re-interviewing as causing defective eligibility determinations.

*Comment:* Another commenter stated that the requirements in proposed § 200.89(a)(2) are unnecessary, and that

they should not apply to those States with a declining population of migratory children that have proactively implemented procedures to improve quality control.

*Discussion:* The Secretary disagrees with the commenter. In order to demonstrate the integrity of the program statewide and nationally, it is necessary for *all* SEAs to carry out the requirements of this section to ensure the accuracy of the State counts of migrant children and the correctness of the State eligibility determination of each child. The fact that an SEA reports a non-zero percent as its defect rate based on a random sample of children included in its retrospective re-interviewing implies statistically that the overall population of identified migratory children in the State will contain approximately this same percentage of ineligible children. An SEA, therefore, needs to generalize from its defect rate to estimate the percentage (and actual number) of ineligible children in its statewide population of migratory children and, then, based on application of the re-interview findings regarding the types of problems that caused the defect rate, search for, locate, identify, and stop serving (and remove from the rolls of eligible migratory children) all children found to be ineligible in the overall statewide population of identified migratory children. For example, finding 20 ineligible children out of a representative sample of 400 (i.e., 5 percent defect rate) implies that, out of an overall population of 5,000 identified migratory children, approximately 250 children (5 percent of 5000 and not just the 20 identified from the sample) would also be ineligible across the State. The SEA must, therefore, begin to implement a re-documentation process to identify and terminate services to all of these ineligible children.

*Changes:* None.

*Comment:* Two commenters questioned the value of the proposed re-documentation requirement, given the burden and associated costs. One commenter stated that the requirement might be appropriate for certain high-risk grantees but not for all States participating in the MEP. The other commenter stated that the expense would be unnecessary, given the current level of attention that has already been focused on MEP quality control issues nationally. One commenter asserted that the annualized costs associated with data burden that we estimated for conducting re-documentation were misleading because we had assigned costs to each State regardless of the size of a State’s population of migratory

children. Both commenters also expressed concern that the costs of a thorough re-documentation would be very high for their respective States if meeting the requirement involved the same level of effort States expended when they conducted their voluntary re-interviewing.

*Discussion:* The Secretary does not agree that the costs of the re-documentation will be particularly high because, as noted previously, the re-documentation can be conducted at the same time that SEAs carry out their usual processes for updating the eligibility and continued residency of migratory children identified as eligible in a prior performance year. The Secretary also strongly believes that this re-documentation effort is an essential step that must be implemented by all SEAs in order to ensure the accuracy and integrity of the States' programs and of the MEP nationally. Such re-documentation is necessary to ensure that MEP funds are used only to provide services to eligible migratory children. This is the case since any MEP funds used to serve ineligible children are not available to serve those who are eligible. Moreover, the provision of service to ineligible children, when ultimately discovered by Departmental monitoring or audit, may require SEAs and LOAs to return funds improperly expended, reductions in future MEP allocations, and the assessment of penalties and/or damages.

*Changes:* None.

*Comment:* One commenter suggested that the re-documentation requirement is unnecessary because, according to the commenter, it would be duplicative of current regulatory requirements that already require annual re-certification of eligibility of each migratory family.

*Discussion:* While the ESEA generally requires that SEAs submit accurate counts of and serve only eligible migratory children, current Departmental regulations do not require, explicitly or implicitly, that SEAs re-certify the eligibility of migratory children annually. If an SEA includes a child in its State child counts based on a prior year's eligibility determination, the SEA must only confirm that the child has lived in the State during the reporting period and that the child made an eligible move not more than 36 months before reporting the child in the State's counts of migratory children. An SEA may conduct an annual re-certification as part of its State-established program requirements, and, in its MEP non-regulatory guidance, the Department has recommended that SEAs conduct such re-certifications as a voluntary quality control measure.

However, MEP regulations have never required that States conduct re-certifications.

*Changes:* None.

*Section 200.89(b) Responsibilities of SEAs for re-interviewing to ensure the eligibility of children under the MEP.*

*Comment:* One commenter objected to the re-interviewing requirements proposed in § 200.89(b), stating that, in the commenter's opinion, requiring any further re-interviewing would constitute a waste of program funds given the amount of funds that have already been expended on the voluntary retrospective re-interviewing process. The commenter recommended eliminating the re-interviewing requirements.

*Discussion:* The Secretary disagrees. The voluntary retrospective re-interviewing process was valuable in identifying serious deficiencies in eligibility determinations in a number of States, and it is necessary, from the point of fairness, to require it in § 200.89(b)(1) of all SEAs that did not participate voluntarily or did not provide what the Secretary determines to be an acceptable defect rate. Similarly, it is necessary to require prospective re-interviewing in § 200.89(b)(2) to ensure a complete system of quality control. For reasons expressed elsewhere in this notice, the Secretary is satisfied that the costs associated with re-interviewing are reasonable and manageable.

*Change:* None.

*Section 200.89(b)(1) Retrospective Re-interviewing.* In all, six individuals or organizations submitted comments on the requirements in § 200.89(b)(1), in which the Department proposed to establish certain minimum technical requirements regarding sample selection, re-interview procedures, and reporting for retrospective re-interviewing.

*Comments:* Four commenters supported the proposed requirement to conduct retrospective re-interviewing. One commenter stated that the proposal was a good idea and would make every State responsible for the re-interviewing process and its results. Two commenters indicated that the re-interviewing requirement would not apply to their State because the State had already conducted re-interviewing under the voluntary re-interview initiative. Another commenter stated that she had no comments concerning the requirements unless the Department does not accept the commenter's State defect rate.

*Discussion:* While the Secretary appreciates these supportive comments, they raise a concern that the language in paragraph (b)(1) of the proposed

regulation was not sufficiently clear about which SEAs would need to conduct retrospective re-interviewing. We note those requirements here and have revised the language in the regulations to clarify the requirements.

Under these regulations, retrospective re-interviewing will be required by: (1) Those few SEAs that do not implement the process voluntarily prior to the effective date of these final regulations; (2) any SEA that submitted a defect rate that the Secretary does not accept; and (3) any SEA implementing it as a corrective action of the Secretary based on prospective re-interviewing results [§ 200.89(b)(2)(vii)] or other quality control checks [§ 200.89(d)(7)].

Currently, SEAs in only two States with operating MEPs have not conducted voluntary re-interviewing and submitted a defect rate to the Department. These two SEAs will be required to conduct retrospective re-interviewing once these final regulations have become effective. Of the remaining SEAs, i.e., those that conducted voluntary re-interviewing and submitted their defect rates to the Secretary, the Secretary has been able to determine all but a small number to be acceptable. After these regulations become effective, the Secretary will notify those few SEAs that submitted unacceptable defect rates that, if the matter of their defect rates is not resolved, they, too, will need to conduct retrospective re-interviewing. Additionally, retrospective re-interviewing may be required of an SEA in the future as a corrective action if necessary under § 200.89(b)(2)(vii) or § 200.89(d)(7).

*Change:* The Secretary has revised § 200.89(b)(1)(i) to clarify that, in addition to those SEAs that have not yet conducted retrospective re-interviewing, any SEA that did so but submitted a defect rate that is not accepted by the Secretary will also be subject to the requirement to conduct retrospective re-interviewing. The revised regulation also now clarifies that the Secretary may require retrospective re-interviewing as a corrective action in order to respond to problems identified through the prospective re-interviewing process (§ 200.89(b)(2)(vii)) or through other quality control checks, including audit and monitoring findings of the Secretary (§ 200.89(d)(7)).

*Comments:* One commenter expressed concern about the sampling requirements for retrospective re-interviewing. This commenter stated that the proposed sample size for retrospective re-interviewing would be similar to the sample size for prospective re-interviewing and that

this would require each State to expend an additional 8,700 person hours annually.

*Discussion:* The commenter has misunderstood the proposed sampling requirements and the amount of effort needed for both prospective and retrospective re-interviewing. First, the statement in the preamble to the NPRM [72 FR 25235] that an estimated 8,700 hours would need to be expended for prospective re-interviewing refers to the estimated total hours to be expended nationally across all States participating in the MEP, not to the effort to be expended by a single State. Second, the sample size and the estimated data burden for retrospective re-interviewing are not the same as for prospective re-interviewing. Rather, both sample size and data burden on staff and migratory families are greater for retrospective re-interviewing than for prospective re-interviewing.

As noted more clearly in the OMB information collection package [1810–0662] and the section of the NPRM entitled *Paperwork Reduction Act of 1995* [72 FR 25238], we estimate that on average only 152 hours of staff time (and 25 hours of migrant parents' time across an estimated statewide sample of 50 migratory parents) per State will be needed to conduct prospective re-interviewing, while an estimated average of 1,580 staff hours and 150 person hours (across an estimated average statewide sample of 300 migrant parents) per State will be needed to conduct retrospective re-interviewing. As we have noted, however, most SEAs have already conducted their retrospective re-interviewing process and will not incur this burden. Only those SEAs that have not conducted retrospective re-interviewing prior to the effective date of these final regulations, those SEAs that have a defect rate that the Secretary does not accept, or those under corrective actions that require retrospective re-interviewing will still have to meet the retrospective re-interviewing requirements established by these final regulations.

*Changes:* None.

*Comments:* One commenter stated that the costs associated with hiring independent re-interviewers to conduct retrospective re-interviewing would be significant and would require States to divert funds and services away from migrant children. The commenter expressed the opinion that imposing these costs was inconsistent with the *Summary of Potential Costs and Benefits* in the NPRM, in which the Department stated that the proposed regulations would not add significantly

to the costs of implementing the MEP. The commenter recommended either providing funds to States to hire independent re-interviewers or eliminating the requirement for independent re-interviewers except in cases where the Secretary determines a significant error rate.

*Discussion:* Consistent with the need for retrospective re-interviewing to ensure the integrity of a State's MEP, the Secretary believes that the use of independent re-interviewers is necessary in conducting retrospective re-interviewing. The Secretary recognizes that hiring and training interviewers independent of the initial eligibility determinations will be somewhat more expensive than using existing program personnel (although existing program personnel may still need to receive training in the re-interviewing process, and SEA or LEA staff already on-staff but paid from non-MEP funds (e.g., State/local audit staff, monitoring staff from other Federal or State programs) may also be considered independent re-interviewers). However, the Secretary believes that any extra costs incurred through the use of independent re-interviewers are an allowable and necessary use of MEP funds and justified by the need to establish the quality and impartiality of a State's re-interviewing process. In any case, the retrospective re-interviewing is only to be conducted in situations where there are significant questions raised about the accuracy of a State's eligibility determinations as identified either through its ongoing quality control processes (including prospective re-interviewing) or because the State did not conduct a retrospective re-interviewing process that resulted in a defect rate that the Secretary accepts.

*Changes:* None.

*Comment:* One commenter asked that we clarify which year States must use for the target child count required for retrospective re-interviewing.

*Discussion:* The Secretary will determine which year's migrant child count an SEA must examine in retrospective re-interviewing based on the reason the SEA is being required to conduct such re-interviewing, i.e., if the SEA did not conduct retrospective re-interviewing prior to the effective date of this final regulation; if a previously submitted defect rate was found to be unacceptable based on the Department's review of the State's re-interviewing process; or if the Department requires it as a corrective action.

*Change:* None.

*Section 200.89(b)(2) Prospective Re-interviewing.* In all, 15 individuals or organizations submitted comments on

proposed § 200.89(b)(2), which would require annual prospective re-interviewing and establish certain minimum technical requirements regarding sample selection, re-interview procedures, reporting, and corrective actions.

*Comments:* One commenter supported our proposal to require prospective re-interviewing because it would ensure that all States actively monitor their eligibility determinations. Two other commenters indicated that their States were already conducting prospective re-interviewing on a sample of children annually.

*Discussion:* The Secretary appreciates the commenters' expressions of support for the proposal to require prospective re-interviewing.

*Changes:* None.

*Comments:* Several commenters expressed concern that the prospective re-interviewing requirements would be costly and burdensome for States to implement. In some cases, the commenters based their concerns on their prior experiences with the Department's voluntary (retrospective) re-interviewing initiative. In other cases, commenters assumed that the 8,700 hours referred to in the preamble to the NPRM represented the burden per State, rather than nationally. Several commenters also were concerned that their States, especially States with small MEP allocations or those with low MEP base-allocation amounts that have experienced influxes of migrant children since FY 2002, would not have sufficient funds to conduct extensive re-interviewing in order to verify eligibility and still be able both to continue to serve migrant children and identify and recruit eligible children for MEP services.

Several of the commenters expressed concern about re-interviewing costs in light of the statement in the preamble to the NPRM [72 FR 25235] that States would need to conduct prospective re-interviews of 100 migrant families annually. These commenters stated that it would be too burdensome and expensive, and in some cases impossible, for States with small MEP allocations to conduct this number of re-interviews on an annual basis. Several commenters asked that the prospective re-interviewing requirement either be eliminated or somehow modified to take into account the differences in the amounts of MEP funding that each State MEP receives. Several commenters suggested increasing each State's MEP allocation to cover the costs associated with prospective re-interviewing. One commenter recommended including a specific line item for this task.

*Discussion:* The Secretary does not agree that the prospective re-interviewing process required in § 200.89(b)(2) will be overly burdensome. As noted elsewhere in this preamble, as well as in the preamble to the NPRM [72 FR 25234], the Secretary believes that prospective re-interviewing constitutes an essential activity in an overall system of quality control.

In reviewing these comments, however, we believe there were some misunderstandings regarding the regulatory requirements and associated burden costs of prospective re-interviewing.

- First, commenters appeared to believe that prospective re-interviewing will be as extensive and difficult as the voluntary retrospective re-interviewing that most SEAs carried out prior to issuance of this regulation;

- Second, commenters appeared to believe that the burden for prospective re-interviewing will be an average of approximately 8,700 hours per State, rather than nationally; and

- Third, there was a misunderstanding that each SEA would be required to prospectively re-interview 100 families per year.

With regard to the first concern, the Secretary recognizes that the voluntary retrospective re-interviewing process that most SEAs conducted was costly and time-consuming. That was the case because the retrospective re-interviewing process entailed: (1) Using a statewide random sample and considerable over-sampling to ensure adequate replacement for those families that could not be located, so that the results could be generalized statewide; and (2) conducting re-interviews after a considerable amount of time had passed between the initial eligibility determination and the re-interview. Prospective re-interviewing, however, will not pose the same difficulties. As we stated in the preamble to the NPRM [72 FR 25235], the sample used for prospective re-interviewing (unlike the sample used for retrospective re-interviewing) does not need to be large enough to generalize to the statewide population of migratory children. Rather, it only needs to be of sufficient size and scope to serve as an early warning system for potential eligibility problems. Additionally, SEAs can and should be conducting their prospective re-interviews relatively soon after the initial eligibility determination is made.

With regard to the second concern, the Secretary believes the misunderstanding stems from a statement in the preamble to the NPRM [72 FR 25235]—that the prospective re-

interview burden would be less than 8,700 hours annually—that was unclear. The 8,700 hours estimated to be required to conduct prospective re-interviewing represents the estimated annual burden in total *nationally*, not per State. As was noted more clearly in the section of the NPRM entitled Paperwork Reduction Act of 1995 [72 FR 25238] and in the OMB information collection package [1810–0662], we estimate that on average only 152 hours of staff time (and 0.5 hours of time for each of 50 migrant parents) per State per year would be needed to conduct prospective re-interviewing.

With regard to the third concern, the Secretary regretfully notes that the reference to prospective re-interviewing of 100 families in the preamble was an error. In fact, as included in the OMB information collection package [1810–0662] and identified in the section of the preamble to the NPRM entitled Paperwork Reduction Act of 1995 [72 FR 25238], the Department's cost and burden estimates for prospective re-interviewing are based on the expectation that, on average, only 50 families would be prospectively re-interviewed per State per year. Accordingly, the language in the preamble to the NPRM should have provided that States “on average” would prospectively re-interview “on an annual basis \* \* \* no more than 50 families.”

Further, our use of the terms, “no more than” and “on average”, when taken together, means that we recognize that under some situations, and especially in the case of States with small numbers of migrant children and, thus, small MEP allocations, an SEA may be able to draw meaningful inferences about the quality of recruiters' eligibility decisions from prospective re-interviews with fewer than 50 families per year and still satisfy the regulatory requirement in § 200.89(b)(2)(ii) to annually sample a “sufficient number of eligibility determinations” randomly on a statewide basis or based on relevant subgroups. Conversely, an SEA in a State with a relatively large number of migrant children and, thus, with a relatively large MEP allocation may find it desirable to re-interview more than 50 families in order to obtain meaningful inferences about the quality of eligibility decisions that its recruiters are making. Issues of sample size will be more fully addressed in non-regulatory guidance on re-interviewing after the publication of this final regulation.

With regard to the other concerns regarding costs, we estimated in the OMB information collection package

[1810–0662], which the NPRM invited the public to review and comment upon, that the average cost per State of the prospective re-interviewing (using the correct average of 50 families per State) will be about \$2,300 annually. Given this estimate, the Secretary does not believe that any SEA will find its costs of undertaking prospective re-interviewing to be unmanageable, and so does not believe that this requirement will result in any significant reduction of direct services to migrant children. SEAs, of course, may use their State MEP allocations to pay for the cost of prospective re-interviewing.

With regard to the recommendations to increase or specifically reserve funds to help States pay the cost of conducting prospective re-interviewing, absent a statutory change the Secretary cannot increase a State's MEP allocation or specifically reserve funds to compensate for the small amount of MEP funds that each State participating in the MEP will have to use to pay for prospective re-interviewing. Nor could the Secretary increase each State's allocation unless the appropriation for the program increases.

*Changes:* None.

*Comment:* Two commenters asked whether the proposed regulations would require that States conduct two, overlapping prospective re-interviewing processes—one activity to be conducted by MEP staff every year and a second activity to be conducted in a given year along with the first activity, at least every third year, by non-MEP re-interviewers.

*Discussion:* The regulations do not require two separate and overlapping procedures for conducting prospective re-interviewing. Section 200.89(b)(2) establishes one annual prospective re-interview process. In conducting the annual prospective re-interview process, the SEA must use independent re-interviewers, rather than MEP-funded re-interviewers, to conduct that re-interviewing at least once every three years. So, for example, if an SEA uses MEP-funded re-interviewers to conduct the annual prospective re-interviews in years 1 and 2, it must use independent re-interviewers to conduct that process in year 3. In order to assist SEAs in implementing these new prospective re-interviewing regulatory requirements, we will be issuing non-regulatory guidance regarding recommended re-interviewing processes following issuance of these final regulations.

*Changes:* None.

*Comment:* In response to our request in the NPRM for input on whether prospective re-interviewing should occur on a less frequent interval than

annually, several commenters stated that prospective re-interviewing should be required less frequently—e.g., either on a biennial basis or once every three years. One commenter recommended conducting re-interviewing “periodically.” Another commenter suggested annual re-interviewing is not necessary given the requirements in § 200.89(d), which establishes a number of other quality control procedures.

*Discussion:* The Secretary appreciates the commenters’ input. After due consideration of the comments, we have concluded that prospective re-interviewing may not occur less frequently than annually. A requirement that prospective re-interviewing be conducted only periodically would not be sufficiently precise. Requiring that the process be conducted biennially or even less frequently, rather than annually, would not be justified in light of the substantial benefit to program integrity that will accrue from conducting the process annually. In this regard, we cannot overemphasize that the national re-interviewing initiative revealed significant problems with eligibility decisions in many parts of the nation. While we are confident that SEAs have taken seriously their responsibility to correct the underlying problems that created this situation, the Secretary believes that continued vigilance is still needed.

Prospective re-interviewing is meant to identify, based on a review of a small sample of families with children found eligible for the MEP, potential problems with eligibility determinations early on—before they become severe. Hence, conducting prospective re-interviewing less frequently than annually would mean that SEAs would have less frequent opportunities to find potential eligibility determination problems, increasing the risk that an eligibility problem will fester or become more widespread and more difficult for the SEA to correct.

*Changes:* None.

*Comment:* Several commenters stated that they believed § 200.89(b)(2) was overly prescriptive. In particular, three commenters suggested that face-to-face re-interviews with migrant families are not necessary and that telephone interviews are sufficient. One of the commenters suggested that the Secretary modify the language of the regulation to provide that the SEA determines what constitutes a reasonable process for conducting prospective re-interviewing.

*Discussion:* The Secretary does not agree that the provisions in this section are overly prescriptive. Rather, while the provisions do establish certain minimum requirements for prospective

re-interviewing, they do so in such a way as to give SEAs considerable flexibility to establish a process that is reasonable based on State-specific circumstances, including the State’s population of migrant children, and specific migratory patterns. For example, paragraph (b)(2)(ii), which describes minimum sampling requirements for prospective re-interviewing, gives SEAs flexibility as to whether to test on a statewide basis or within particular categories and risk factors. It also suggests but does not require absolute use of any or all of several risk factors that might be used to define the particular categories on which re-interviewing might be focused in a given year.

Despite the flexibility already offered in the NPRM, the Secretary, in response to the comments, has revised the language in paragraph (b)(2)(iii) to provide further flexibility by noting that an alternative to face-to-face interviewing may be used if face-to-face interviewing is determined to be impractical, and specifically noting telephone interviewing is one allowable alternative. This revision removes the language that was contained in the proposed regulations that required an SEA to show that extraordinary circumstances made it impractical to conduct face-to-face interviewing.

*Changes:* The Secretary has revised paragraph (b)(2)(iii) to provide that SEAs must use a face-to-face approach to conduct prospective re-interviews unless circumstances make the face-to-face re-interviews impractical and necessitate the use of an alternative method such as telephone re-interviews.

*Comment:* Several commenters expressed concerns about the sample size requirements for prospective re-interviewing. One commenter recommended modifying the regulations to require a smaller sample size for prospective re-interviewing than the average of 100 families that the NPRM suggested. Three commenters expressed concern that the proposed regulatory language regarding sample size was too imprecise, and recommended that the Secretary clearly define terms such as “random sampling” and “sufficient sample,” and establish five percent or another specific percentage of families that each State must re-interview prospectively. One commenter asked that we clarify how the proposed requirement to use “a statewide random sample with a confidence interval of 5 percent” could be applied in a State with a large migrant population if only 100 families a year are re-interviewed.

*Discussion:* With respect to the comment regarding use of an average of

100 families for the sample size for re-interviewing, we previously noted that this reference was an error and that the correct sample size would generally be no more than 50 families, on average.

The Secretary does not agree that the language in paragraph (b)(2)(ii) is imprecise; we believe this language provides an appropriate level of detail for a regulation and permits a State some flexibility depending on specific circumstances. By the term “sufficient sample,” we mean a smaller and less precise sample than the one required for retrospective re-interviewing. We mean the term “random sample” to have the meaning generally used in the field of statistics. This said, we intend to provide further guidance to States on random sampling, sample sizes, and other aspects of the re-interviewing requirements in non-regulatory guidance following the issuance of these final regulations.

The requirement to use a statewide random sample (at a 95 percent confidence level with a confidence interval of plus or minus five percent) refers only to the requirements for retrospective re-interviewing; in contrast, for prospective re-interviewing the SEA need only select a sample of sufficient size and scope to enable the process to serve as an adequate early warning system about potential eligibility problems.

*Changes:* None.

*Comment:* Three commenters expressed concern about the costs and effort needed if independent re-interviewers (i.e., non-MEP personnel) are required for prospective re-interviewing.

*Discussion:* As we have discussed previously, we do not believe that implementing the prospective re-interviewing requirement, including the provisions for use of independent re-interviewers, will create significant cost or burden particularly when compared to the benefit of using independent re-interviewers at least once every three years to verify the eligibility determinations for the sample selected. Using independent re-interviewers periodically allows States to avoid even the appearance of a possible conflict of interest in making decisions about program eligibility determinations that affect the size of grant and subgrant amounts and, thus, contributes to ensuring the ongoing integrity of the MEP. Also, such independent re-interviewers may already be on staff at an SEA or local site—e.g., monitoring or audit staff for another program—and so already have their salaries paid. They would be considered “independent re-interviewers” so long as they do not

operate or administer the MEP or are not responsible for the initial eligibility determinations they are reviewing.

*Changes:* None.

*Comment:* Three commenters objected to our proposal to require States to use re-interviewing as the sole or primary method for ensuring the quality of eligibility determinations. The commenters recommended that States' primary focus in ensuring quality should be on providing training and technical assistance to recruiters and other relevant personnel. The commenters indicated that a verification process should be undertaken, but not involve annual re-interviewing of substantial numbers of families. These commenters recommended that States be required to develop and implement a system of internal controls, such as testing of recruiters, certification of recruiters' training, checking recruiters' work and certificates of eligibility closely, and related activities, in order to ensure that procedures are appropriate and followed conscientiously. Additionally, the commenters recommended that we require States to more closely scrutinize eligibility determinations in geographic areas that experience a change in demographics, in areas where there are new recruiters, and in areas where there have been findings of mistakes.

Three commenters stated that the institutionalization of the prospective re-interviewing process in regulations and requiring the reporting of a new "defect rate" each year would be unwarranted and detrimental. The commenters argued that if a family is deemed to be ineligible through the State's other existing quality control processes, the family should simply be removed from the list of children to be served. The commenters suggested that, if proper training and support are in place and the Department conducts appropriate site visit monitoring, there should be no noticeable or worrisome problems with the eligibility determination process in the future. The commenters recommended that the States be required to adopt a "verification of eligibility plan" that would be submitted to the Secretary for approval.

*Discussion:* The Secretary is in general agreement with the commenters. The Secretary agrees that prospective re-interviewing is not and should not be the sole or primary focus of a State's MEP quality control process, and that it is important that SEAs examine eligibility determinations based on specific risk factors and other criteria. The Secretary believes that this approach is already reflected in the

language in § 200.89(d), which outlines the minimum components of a State's quality control system, and in § 200.89(b)(2)(ii), which indicates that the sample selected for prospective re-interviewing may be based on categories associated with particular risk factors. Additionally, the Secretary agrees that prospective re-interviewing should not need to involve annual re-interviewing of "substantial numbers" of families—that 50 families per year would generally be sufficient.

The Secretary does not agree that prospective re-interviewing is unnecessary or detrimental. As we explained in the NPRM and in this preamble, conducting prospective re-interviewing is essential, as one part of an SEA's overall quality control system, for maintaining a high degree of program integrity in the State and nationally. Conducting prospective re-interviewing annually is necessary to help promote SEA vigilance in checking on the accuracy of State MEP eligibility determinations shortly after they are made, rather than allowing several years to pass before eligibility problems can be identified and corrected.

We note that the Department never intended the prospective re-interviewing process to result in an annual computation of a "defect rate." Rather, we intended it to serve as a part of an SEA's early warning system for eligibility problems. In this regard, if an SEA uncovers eligibility problems through prospective re-interviewing of the sample of children previously found eligible (or by the other review processes described in paragraph (d)), the SEA may have uncovered a problem that is far more pervasive than the ineligibility of the child or children on which the prospective re-interviewing focused. Simply removing these children from the rolls of eligible children as suggested by the commenters, without investigating whether the problem is broader, would not constitute a sufficient or responsible response to the findings. Instead, depending on the nature of the problems identified, the SEA must take corrective action as called for in paragraphs (b)(2)(vii) and (d)(7), including where appropriate, more extensive re-interviewing, to examine the extent of the problem, and then correct it.

Finally, the Secretary declines to adopt the commenters' recommendation that we require States to develop and submit a "verification of eligibility plan," in place of the prospective re-interviewing, since requiring the development and submission of such a plan would impose additional burden

on States while not providing useful information other than a list of promised activities similar to those we have included in the regulations.

*Changes:* None.

*Section 200.89(c) Responsibilities of SEAs to document the eligibility of migratory children.*

*Comments:* Ten commenters addressed the proposed provisions in § 200.89(c) establishing requirements for States to follow when documenting the eligibility of migrant children.

Two commenters supported our proposal to require States to use a national COE. However, one of these commenters expressed concern regarding when and how the national COE would be developed and implemented. One commenter noted that the proposal for use of a national COE should provide greater consistency of information and training on completing the documentation.

Several other commenters expressed concerns about the proposal to require use of a national COE. One commenter noted that each State has different patterns of work and mobility, and the information necessary for a determination of eligibility in one State may not be necessary in another State. Several commenters suggested that the Secretary establish a basic COE of required information that States could add to, but not subtract from, to document eligibility. Another commenter suggested that, rather than requiring the use of a single national form, the Department specify certain required data fields to be included on each State's individual form. Still another commenter suggested that, rather than require use of a national COE, the Department should allow States to submit their COEs to the Department for approval. According to the commenter, this approach would provide States with flexibility in developing the COE and still ensure that each State's COE contains the minimum data necessary to document eligibility.

Several commenters stated that additional cost and effort will be required to change existing individual State forms to a national form and to align existing migratory student data systems to the national COE. One commenter noted that each subsequent change to a national COE would necessitate changes to the forms and databases used by the States.

One commenter stated that we should not require parental signatures on the COE. The commenter noted that inclusion of the parental signature placed the burden for accuracy on the migratory parent, rather than on the program recruiter who completes the

COE. The commenter also stated that the COE would have to be translated into Spanish, so that parents who only speak Spanish could understand what they are signing. The commenter also noted that the Department should consider how the requirement would be applied if the migratory parents were illiterate.

The commenter also suggested that the Department clarify the legal consequences if it finds that a COE completed by a recruiter and signed by the parent contains false information.

One commenter expressed concern that the proposed COE does not include information about how the data collected will be shared. The commenter believed that including such a statement on the COE was necessary under the Family Educational Rights and Privacy Act (FERPA).

Finally, one commenter requested that we clarify what would be considered "additional documentation" under § 200.89(c)(2). The commenter stated that without this clarification, the commenter's agency would be unable to assess the impact of this aspect of the proposed regulation. Another commenter also stated that this term could be interpreted differently from State to State and, therefore, suggested that it be clarified.

*Discussion:* As discussed in the NPRM [72 FR 25235], the Secretary believes that the establishment and use of a national COE, as proposed in § 200.89(c)(1), are necessary to (1) ensure consistency among the various State programs in recording, retaining and transferring MEP records; and (2) help prevent incorrect eligibility decisions that might occur because of a State's use of a COE the SEA had produced that is not fully adequate. The Secretary understands the desire expressed by commenters for continued use of their own States' COEs or for an alternative that would have the Secretary establish only the minimum content of their States' COEs. However, the Secretary believes that information gathered in the course of State audits and the national re-interview initiative confirm that SEAs have used too many different iterations of COEs that in one way or another are problematic, and that program integrity now demands use of a common reporting form that all States will use when making determinations about migrant eligibility.

The Secretary recognizes that the use of the national COE will require some SEAs to change somewhat their existing practices for documenting eligibility, and that these changes will have implications in the short run relative to costs and staff time. However, given that

all SEAs have for many years voluntarily used some form of COE to document eligibility that contains most if not all the required data fields in the proposed national COE, the Secretary does not believe that costs and staff time (all of which may be paid with MEP funds) associated with substituting the national COE for their State COEs and revising their databases accordingly will be so great as to outweigh the advantages to the MEP as a whole of using a standard national COE.

The Secretary thanks the commenters for their input on the final format and content of the COE, including the requirement for the COE to be signed by the parent. We are currently working with OMB to finalize this data collection and will be considering these comments in making revisions to the national COE. The public also will have a further opportunity to comment on the revised national COE and the associated information collection package [1810–0662] following the publication of these final regulations, and we will consider those comments as we finalize the data collection. Once the complete information collection package is approved by OMB, we will provide training and technical assistance on use of the national COE, on issues that include the need for the parental signature and the rights and responsibilities of COE signatories under FERPA and the False Claims Act, through non-regulatory guidance and the Department's Migrant Education Resource Center (MERC).

We now address comments about the meaning of the requirement in § 200.89(c)(2) that the SEA and its operating agencies "develop and maintain such additional documentation as may be necessary to confirm that each child found eligible for this program meets all of the eligibility definitions in § 200.81," and that different States may require different information to be collected to document eligibility. We proposed this provision in recognition of the fact that, depending on the circumstances of individual children, a State may determine that documentation of a child's eligibility for the MEP requires more than the mere summary of a parental interview as recorded on the national COE. Such additional documentation might include, for example, information validating temporary employment, explaining the specific circumstances regarding personal subsistence or economic necessity, or re-interviewing results. The additional documentation requirement also permits inclusion of any other items of information currently

collected by States that are, according to several commenters, not included on the national COE.

*Changes:* None.

*Section 200.89(d) Responsibilities of an SEA to establish and implement a system of quality controls for the proper identification of eligible migratory children.*

*Comments:* Seven commenters addressed one or more elements of the proposed quality control requirements in § 200.89(d).

Three commenters indicated that the proposed quality control procedures in § 200.89(d) would adequately ensure high quality in program eligibility determinations, and that their implementation, in concert with other suggestions these commenters made regarding the re-interviewing requirements in § 200.89(b), would reduce the need for substantial, annual face-to-face re-interviewing and thereby preserve program resources and reduce alienation from the program. One commenter recommended that the Department reconsider regulating on how SEAs implement quality control procedures. This commenter suggested that many States have addressed their previously identified quality control problems. The commenter also stated that the proposed regulatory requirements in this section would be costly to implement and would require States to reallocate program funds that are currently spent on services to children, without effectively reducing defective eligibility determinations beyond the current levels. This commenter also proposed that States that have effective quality control systems in place and can document a defect rate that is lower than the national average should be exempt from the proposed quality control requirements in this section.

One commenter expressed concern that the formal process for resolving eligibility questions and distributing written rulings required in paragraph (d)(3) was overly prescriptive and burdensome. Another commenter, while expressing various concerns about the quality of the identification and recruitment practices in the commenter's State, suggested that the Secretary establish, by regulation, several additional quality control requirements regarding the qualifications, hourly pay, and training of recruiters.

*Discussion:* As discussed in the preamble to the NPRM (72 FR 25236), the Secretary believes that, given that defective eligibility determinations were uncovered in virtually every State during the voluntary re-interviewing

initiative, it is necessary to establish, through regulation, a minimum set of responsibilities that all States must establish for quality control of their MEP identification and recruitment procedures. The Secretary recognizes that most SEAs are currently implementing some or all of these requirements voluntarily and that, in cases where an SEA is not now implementing one or more of the regulatory requirements, that SEA will face an increased expenditure of time, effort and funds to implement the other regulatory requirements of this section. However, given that the Secretary believes that the regulations represent a *minimum* set of requirements, the Secretary does not believe that situations noted by the commenters (having a defect rate lower than the national average, voluntarily implementing one or another quality control activity, or the increased effort and expenditures that would need to be devoted to implementing all of the proposed quality control procedures) justify exempting any SEA from the responsibility to establish and implement all of these quality control measures.

Moreover, if, as the commenters suggest, most SEAs already have addressed their identified quality control problems by voluntarily implementing some or all of these procedures, the requirements in paragraph (d) will not place an undue burden on State and local MEP staff. This said, the Secretary agrees that the language in paragraph (d)(3), as proposed, may be overly prescriptive in that requiring written copies of all policy determinations to be transmitted to all LOAs might not always be needed in order to meet the basic intent of this regulatory provision—ensuring the sharing of SEA policy interpretations regarding program eligibility with local program personnel.

Finally, the Secretary believes that more technical aspects of quality control, such as the qualifications and training of recruiters, are matters better addressed through suggested best practices in non-regulatory guidance, rather than as regulatory requirements.

**Change:** We have amended § 200.89(d)(3) to remove the requirement that answers to eligibility questions be transmitted from the SEA to its LOAs in written form.

**Comment:** None.

**Discussion:** As part of our internal review of the final regulations, we have determined that a technical edit needed to be made to paragraph (d)(7) of § 200.89 in order to clarify that the corrective actions mentioned in that

paragraph may also result from monitoring or audit findings of the Secretary or the State.

**Changes:** We have modified the language in paragraph (d)(7) to clarify that Federal monitoring or audit findings, as well as internal State audit findings and recommendations, may also trigger the SEA's process for implementing corrective actions.

#### Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive order.

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, we have determined that the benefits of the regulations justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

#### Summary of Potential Costs and Benefits

These regulations require SEAs to establish specific procedures to standardize and improve the accuracy of program eligibility determinations and clarify requirements for development of comprehensive statewide needs assessments and service delivery plans. The primary impact of the regulations is on SEAs that receive MEP funds and the children who are eligible for services under the MEP. By requiring SEAs to establish procedures to improve the accuracy of their eligibility determinations, the regulations will ensure that program funds and the services they fund are directed only to children who are eligible to receive services and reduce the possibility that children who are not eligible for services receive program benefits. The regulations issued through this notice also add clarity where the statute is ambiguous or unclear.

The Department estimates that the additional annual cost to recipients to comply with these regulations will be approximately \$4.5 million:

- Adding measurable program outcomes to the State comprehensive MEP service delivery plan [§ 200.83] will cost approximately \$600 annually in total across all SEAs;
- Re-interviewing samples of students [§ 200.89(b)] will cost approximately \$220,000 annually in total across all SEAs;
- Documenting the eligibility of migratory children, including the use of a standard COE [§ 200.89(c)] will cost approximately \$2.8 million annually in total across all SEAs; and
- Institution of specific quality control procedures [§ 200.89(d)] will cost approximately \$1.5 million annually in total across all SEAs.

This estimate is based on and further explained in the information collection package required under the Paperwork Reduction Act of 1995 and discussed in more detail elsewhere in this notice in the sections entitled *Analysis of Comments and Changes* and *Paperwork Reduction Act of 1995*.

These regulations will not add significantly to the costs of implementing the MEP since we estimate that the SEAs are currently expending approximately these amounts implementing various eligibility determination activities, but the regulations will add significantly to the consistency of eligibility determinations by standardizing the eligibility determination process nationally. The activities required by these regulations will be financed through the

appropriation for Title I, Part C (MEP) and will not impose a financial burden that SEAs and local educational agencies will have to meet from non-Federal resources.

The regulations will help maintain public confidence in the program and ensure its continued operational integrity. Department analyses have shown that, on average, close to 12 percent of the children identified by SEAs as eligible for services for school year 2003–04 did not meet the statutory eligibility criteria. The regulations provide a benefit by ensuring that program funds are directed only to eligible migratory children. Increased accuracy will also ensure that program funds are allocated in the proper amounts and to the locations where eligible children reside. If implementation of the regulations results in 12 percent of currently participating children being determined ineligible, then some \$46 million annually (12 percent of the appropriation) would be redirected from services to statutorily ineligible children to serving children who meet the statutory criteria. Because the statute is intended to focus on eligible children who have a genuine need for services (as a result of having made a qualifying move), there is a clear societal benefit to

ensuring that program funds are used only to serve eligible students.

More specifically, society as a whole benefits when migratory children receive educational services targeted to their specific needs. As noted in numerous studies since the nineteen sixties,<sup>4</sup> the migratory children who are eligible to receive program benefits constitute a particularly needy and vulnerable school population. Migrant families tend to live in poverty, speak limited English, and lack access to preventive medical care. Few children from migrant families attend preschool, and they are often enrolled in high-poverty schools. Migratory youth are at high risk for dropping out of school without attaining a high school diploma. Access to education can help mitigate the effect of these risk factors. Preschool education prepares small children for the demands of elementary education and encourages parents to become active learners along with their children. Children who receive educational services targeted to address their specific needs are more likely to be successful in school and to receive other marginal services, such as vaccinations and health screenings, that are associated with school attendance. Youth who complete high school generally earn more in their lifetime

than those who don't earn a high school diploma. These regulations benefit society because they require safeguards to ensure that the neediest migrant children will be identified and receive the services that will help them succeed in school.

There is also a potential cost to migratory children if these regulations are not enacted. In the absence of regulations, recipients have diluted the quantity and quality of services available to children who are legitimately eligible for services under the program by serving significant numbers of children who are not eligible. Since MEP services are only available to eligible children for a short period of time, preventing truly eligible migratory children from receiving the services they are entitled to may have an adverse effect on their educational attainment.

**Paperwork Reduction Act of 1995**

The regulations listed in the following chart contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to OMB for its review.

Regulatory section	Collection information	Collection
§ 200.83 .....	Requires SEAs to add measurable program outcomes into the comprehensive MEP State plan for service delivery.	"Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662.
§ 200.89(b)(1) .....	Requires SEAs to conduct retrospective re-interviewing	"Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662.
§ 200.89(b)(2) .....	Requires SEAs to conduct prospective re-interviewing ..	"Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662.
§ 200.89(c) .....	Requires SEAs to document the eligibility of migratory children.	"Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662.
§ 200.89(d) .....	Requires SEAs to establish a system of quality controls	"Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662.

Respondents to this collection consist of SEAs and their LOA subgrantees (usually, but not exclusively, LEAs) as well as parents of migratory children. The collection of information is necessary to accurately identify and serve eligible migratory children. The proposed frequency of response is no more than annually.

The estimated total annual reporting and recordkeeping burden that will result from the collection of information is 510,456 hours. The estimated average burden hours per response are approximately 1,580 hours per each of 15 State respondents (i.e., SEA and

subgrantee staff), and 0.5 hours per each of 4,500 migrant parent respondents to address (on a one-time basis) the requirements of § 200.89(b)(1) for retrospective re-interviewing. We estimate that it will require approximately 152 hours per each of 49 State respondents and 0.5 hours per each of 2,450 migrant parent respondents to address (annually) the requirements of § 200.89(b)(2) for prospective re-interviewing. We estimate that it will require approximately 17,347 hours per each of 49 States and 1.5 hours per each of 300,000 parents (overall) to address the

requirements of § 200.89(c) for documenting the eligibility of migratory children. We estimate that it will require approximately 1,220 hours per each of 49 States to address (annually) the requirements of § 200.89(d) to establish and implement adequate quality controls. We also estimate that the data burden associated with the proposed change in § 200.83 to add measurable program outcomes into the comprehensive MEP State plan for service delivery will not total more than one hour per SEA.

If you want to comment on the information collection requirements,

<sup>4</sup> See, for example, *Invisible Children: A portrait of migrant education in the United States*, National Commission on Migrant Education, U.S. Govt.

Printing Office, Sept. 23, 1992; and *The same high standards for migrant students: Holding Title I*

*schools accountable*, United States Department of Education, Washington DC, 2002.

please address your comments to the Desk Officer for Education, Office of Information and Regulatory Affairs, OMB, and send via e-mail to [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or via fax to (202) 395-6974. Commenters need only submit comments via one submission medium. You may also send a copy of these comments to the Department representative named in the **FOR FURTHER INFORMATION CONTACT** section of this preamble. We consider your comments on these proposed collections of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication.

### Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, we intend this document to provide early notification of the Department's specific plans and actions for this program.

### Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet

at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

You may also view this document in text or PDF at the following site: <http://www.ed.gov/programs/mep/legislation.html>.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

(Catalog of Federal Domestic Assistance Number 84.011: Title I, Education of Migrant Children.)

### List of Subjects in 34 CFR Part 200

Administrative practice and procedure, Adult education, Allocation of funds, Children, Coordination, Education of children with disabilities, Education of disadvantaged children, Elementary and secondary education, Eligibility, Family, Family-centered education, Grant programs—education, Indians—education, Institutions of higher education, Interstate coordination, Intrastate coordination, Juvenile delinquency, Local educational agencies, Local operating agencies, Migratory children, Migratory workers, Neglected, Nonprofit private agencies, Private schools, Public agencies, Quality control, Re-interviewing, Reporting and recordkeeping requirements, State-administered programs, State educational agencies, Subgrants.

Dated: July 18, 2008.

**Kerri L. Briggs,**

*Assistant Secretary for Elementary and Secondary Education.*

■ For the reasons discussed in the preamble, the Secretary amends part 200 of title 34 of the Code of Federal Regulations as follows:

### PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

■ 1. The authority citation for part 200 continues to read as follows:

**Authority:** 20 U.S.C. 6301 through 6578, unless otherwise noted.

■ 2. Revise § 200.81 to read as follows:

#### § 200.81 Program definitions.

The following definitions apply to programs and projects operated under subpart C of this part:

(a) *Agricultural work* means the production or initial processing of crops, dairy products, poultry, or livestock, as well as the cultivation or harvesting of trees. It consists of work performed for wages or personal subsistence.

(b) *Fishing work* means the catching or initial processing of fish or shellfish or the raising or harvesting of fish or shellfish at fish farms. It consists of work performed for wages or personal subsistence.

(c) *In order to obtain*, when used to describe why a worker moved, means that one of the purposes of the move is to seek or obtain qualifying work.

(1) If a worker states that a purpose of the move was to seek any type of employment, i.e., the worker moved with no specific intent to find work in a particular job, the worker is deemed to have moved with a purpose of obtaining qualifying work if the worker obtains qualifying work soon after the move.

(2) Notwithstanding the introductory text of this paragraph (c), a worker who did not obtain qualifying work soon after a move may be considered to have moved in order to obtain qualifying work only if the worker states that at least one purpose of the move was specifically to seek the qualifying work, and—

(i) The worker is found to have a prior history of moves to obtain qualifying work; or

(ii) There is other credible evidence that the worker actively sought qualifying work soon after the move but, for reasons beyond the worker's control, the work was not available.

(d) *Migratory agricultural worker* means a person who, in the preceding 36 months, has moved, as defined in paragraph (g), from one school district to another, or from one administrative area to another within a State that is comprised of a single school district, in order to obtain temporary employment or seasonal employment in agricultural work, including dairy work.

(e) *Migratory child* means a child—

(1) Who is a migratory agricultural worker or a migratory fisher; or

(2) Who, in the preceding 36 months, in order to accompany or join a parent, spouse, or guardian who is a migratory agricultural worker or a migratory fisher—

(i) Has moved from one school district to another;

(ii) In a State that is comprised of a single school district, has moved from one administrative area to another within such district; or

(iii) As the child of a migratory fisher, resides in a school district of more than

15,000 square miles, and migrates a distance of 20 miles or more to a temporary residence.

(f) *Migratory fisher* means a person who, in the preceding 36 months, has moved, as defined in paragraph (g), from one school district to another, or from one administrative area to another within a State that is comprised of a single school district, in order to obtain temporary employment or seasonal employment in fishing work. This definition also includes a person who, in the preceding 36 months, resided in a school district of more than 15,000 square miles and moved, as defined in paragraph (g), a distance of 20 miles or more to a temporary residence in order to obtain temporary employment or seasonal employment in fishing work.

(g) *Move* or *Moved* means a change from one residence to another residence that occurs due to economic necessity.

(h) *Personal subsistence* means that the worker and the worker's family, as a matter of economic necessity, consume, as a substantial portion of their food intake, the crops, dairy products, or livestock they produce or the fish they catch.

(i) *Qualifying work* means temporary employment or seasonal employment in agricultural work or fishing work.

(j) *Seasonal employment* means employment that occurs only during a certain period of the year because of the cycles of nature and that, by its nature, may not be continuous or carried on throughout the year.

(k) *Temporary employment* means employment that lasts for a limited period of time, usually a few months, but no longer than 12 months. It typically includes employment where the employer states that the worker was hired for a limited time frame; the worker states that the worker does not intend to remain in that employment indefinitely; or the SEA has determined on some other reasonable basis that the employment is temporary. The definition includes employment that is constant and available year-round only if, within 18 months after the effective date of this regulation and at least once every three years thereafter, the SEA documents that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State's prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

■ 3. Amend § 200.83 as follows:

■ a. Redesignate paragraphs (a)(3) and (a)(4) as paragraphs (a)(4) and (a)(5),

respectively, and add a new paragraph (a)(3).

■ b. Revise the introductory text of redesignated paragraph (a)(4).

The revision and addition read as follows:

**§ 200.83 Responsibilities of SEAs to implement projects through a comprehensive needs assessment and a comprehensive State plan for service delivery.**

(a) \* \* \*

(3) *Measurable program outcomes.*

The plan must include the measurable program outcomes (i.e., objectives) that a State's migrant education program will produce to meet the identified unique needs of migratory children and help migratory children achieve the State's performance targets identified in paragraph (a)(1) of this section.

(4) *Service delivery.* The plan must describe the strategies that the SEA will pursue on a statewide basis to achieve the measurable program outcomes in paragraph (a)(3) of this section by addressing—

\* \* \* \* \*

■ 4. Add § 200.89 to read as follows:

**§ 200.89 MEP allocations; Re-interviewing; Eligibility documentation; and Quality control.**

(a) *Allocation of funds under the MEP for fiscal year (FY) 2006 and subsequent years.* (1) For purposes of calculating the size of MEP allocations for each SEA for FY 2006 and subsequent years (as well as for supplemental MEP allocations for FY 2005), the Secretary determines each SEA's FY 2002 base allocation amount under section 1303(a)(2) and (b) of the Act by applying, to the counts of eligible migratory children that the SEA submitted for 2000–2001, the defect rate that the SEA reports to the Secretary and that the Secretary accepts based on a statewide retrospective re-interviewing process that the SEA has conducted.

(2)(i) The Secretary conditions an SEA's receipt of final FY 2007 and subsequent-year MEP awards on the SEA's completion of a thorough re-documentation of the eligibility of all children (and the removal of all ineligible children) included in the State's 2007–2008 MEP child counts.

(ii) To carry out this re-documentation, an SEA must examine its rolls of all currently identified migratory children and remove from the rolls all children it judges to be ineligible based on the types of problems identified in its statewide retrospective re-interviewing as causing defective eligibility determinations.

(b) *Responsibilities of SEAs for re-interviewing to ensure the eligibility of children under the MEP.*

(1) *Retrospective re-interviewing.*

(i) As a condition for the continued receipt of MEP funds in FY 2006 and subsequent years, an SEA that received such funds in FY 2005 but did not implement a statewide re-interviewing process prior to the enactment of this regulation, as well as an SEA with a defect rate that is not accepted by the Secretary under paragraph (a)(1) of this section, or an SEA under a corrective action issued by the Secretary under paragraph (b)(2)(vii) or (d)(7) of this section, must, within six months of the effective date of these regulations or as subsequently required by the Secretary,—

(A) Conduct a statewide re-interviewing process consistent with paragraph (b)(1)(ii) of this section; and

(B) Consistent with paragraph (b)(1)(iii) of this section, report to the Secretary on the procedures it has employed, its findings, its defect rate, and corrective actions it has taken or will take to avoid a recurrence of any problems found.

(ii) At a minimum, the re-interviewing process must include—

(A) Selection of a sample of identified migratory children (from the child counts of a particular year as directed by the Secretary) randomly selected on a statewide basis to allow the State to estimate the statewide proportion of eligible migratory children at a 95 percent confidence level with a confidence interval of plus or minus 5 percent.

(B) Use of independent re-interviewers (i.e., interviewers who are neither SEA or local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested) trained to conduct personal interviews and to understand and apply program eligibility requirements; and

(C) Calculation of a defect rate based on the number of sampled children determined ineligible as a percentage of those sampled children whose parent/guardian was actually re-interviewed.

(iii) At a minimum, the report must include—

(A) An explanation of the sample and procedures used in the SEA's re-interviewing process;

(B) The findings of the re-interviewing process, including the determined defect rate;

(C) An acknowledgement that, consistent with § 200.89(a), the Secretary may adjust the child counts for 2000–2001 and subsequent years

downward based on the defect rate that the Secretary accepts;

(D) A summary of the types of defective eligibility determinations that the SEA identified through the re-interviewing process;

(E) A summary of the reasons why each type of defective eligibility determination occurred; and

(F) A summary of the corrective actions the SEA will take to address the identified problems.

(2) *Prospective re-interviewing.* As part of the system of quality controls identified in § 200.89(d), an SEA that receives MEP funds must, on an annual basis, validate current-year child eligibility determinations through the re-interview of a randomly selected sample of children previously identified as migratory. In conducting these re-interviews, an SEA must—

(i) Use, at least once every three years, one or more independent interviewers (i.e., interviewers who are neither SEA or local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested) trained to conduct personal interviews and to understand and apply program eligibility requirements;

(ii) Select a random sample of identified migratory children so that a sufficient number of eligibility determinations in the current year are tested on a statewide basis or within categories associated with identified risk factors (e.g., experience of recruiters, size or growth in local migratory child population, effectiveness of local quality control procedures) in order to help identify possible problems with the State's child eligibility determinations;

(iii) Conduct re-interviews with the parents or guardians of the children in the sample. States must use a face-to-face approach to conduct these re-interviews unless circumstances make face-to-face re-interviews impractical

and necessitate the use of an alternative method such as telephone re-interviewing;

(iv) Determine and document in writing whether the child eligibility determination and the information on which the determination was based were true and correct;

(v) Stop serving any children found not to be eligible and remove them from the data base used to compile counts of eligible children;

(vi) Certify and report to the Department the results of re-interviewing in the SEA's annual report of the number of migratory children in the State required by the Secretary; and

(vii) Implement corrective actions or improvements to address the problems identified by the State (including the identification and removal of other ineligible children in the total population), and any corrective actions, including retrospective re-interviewing, required by the Secretary.

(c) *Responsibilities of SEAs to document the eligibility of migratory children.* (1) An SEA and its operating agencies must use the Certificate of Eligibility (COE) form established by the Secretary to document the State's determination of the eligibility of migratory children.

(2) In addition to the form required under paragraph (a) of this section, the SEA and its operating agencies must maintain any additional documentation the SEA requires to confirm that each child found eligible for this program meets all of the eligibility definitions in § 200.81.

(3) An SEA is responsible for the accuracy of all the determinations of the eligibility of migratory children identified in the State.

(d) *Responsibilities of an SEA to establish and implement a system of quality controls for the proper identification and recruitment of eligible migratory children.* An SEA must establish and implement a system of quality controls for the proper

identification and recruitment of eligible migratory children on a statewide basis. At a minimum, this system of quality controls must include the following components:

(1) Training to ensure that recruiters and all other staff involved in determining eligibility and in conducting quality control procedures know the requirements for accurately determining and documenting child eligibility under the MEP.

(2) Supervision and annual review and evaluation of the identification and recruitment practices of individual recruiters.

(3) A formal process for resolving eligibility questions raised by recruiters and their supervisors and for ensuring that this information is communicated to all local operating agencies.

(4) An examination by qualified individuals at the SEA or local operating agency level of each COE to verify that the written documentation is sufficient and that, based on the recorded data, the child is eligible for MEP services.

(5) A process for the SEA to validate that eligibility determinations were properly made, including conducting prospective re-interviewing as described in paragraph (b)(2).

(6) Documentation that supports the SEA's implementation of this quality-control system and of a record of actions taken to improve the system where periodic reviews and evaluations indicate a need to do so.

(7) A process for implementing corrective action if the SEA finds COEs that do not sufficiently document a child's eligibility for the MEP, or in response to internal State audit findings and recommendations, or monitoring or audit findings of the Secretary.

**Authority:** 20 U.S.C. 6391–6399, 6571, 7844(d); 18 U.S.C. 1001.

[FR Doc. E8–16859 Filed 7–28–08; 8:45 am]

**BILLING CODE 4000–01–P**